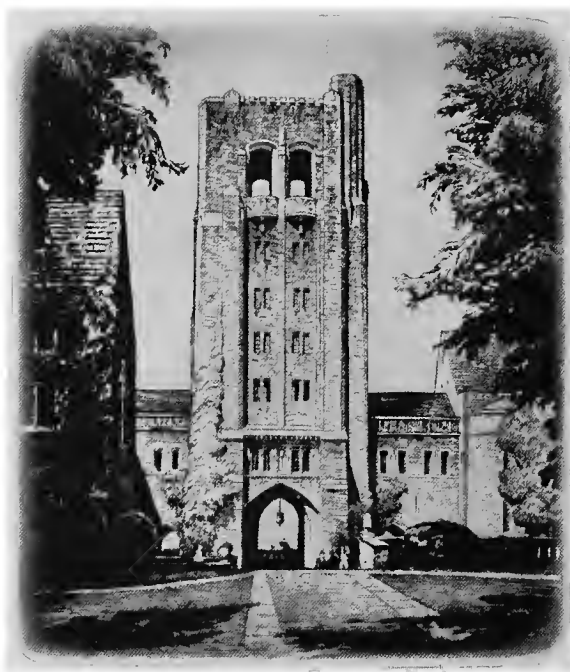


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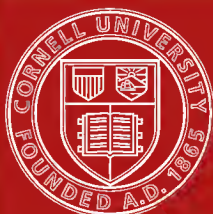
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GENERAL ASSIGNMENTS

FOR CREDITORS,

IN THE STATE OF NEW YORK.

THE LATEST STATUTES, DECISIONS AND RULES OF
PRACTICE RELATING TO ASSIGNMENTS, AND
FORMS ADAPTED THERETO.

BY WM. E. BULLOCK,

AUTHOR OF "NEW YORK EXCISE LAW."

NEW YORK AND ALBANY :
BANKS & BROTHERS, LAW PUBLISHERS.

1888.

LA 4550.

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P R E F A C E.

The General Assignment act of 1877 is chiefly an act of practice and procedure. It is neutral, as to the right of debtors to make assignments, for the benefit of their creditors. Its object was not to explain the nature of such assignments, or to prescribe tests by which to determine their validity, or to define the functions and liabilities of assignees.

I have, therefore, devoted chapter I. of this treatise to the general requisites of assignments; chapter II., to void assignments; chapter III., to the rights and duties of assignees; and chapter IV., to the said act of 1877, and its amendments.

In passing the amending act of 1887, the Legislature abandoned their position of neutrality between an assigning debtor and his creditors, and declared that his preferences to favored creditors should be limited to one third of the value of his property. This act was a direct and authoritative expression of the conviction which has always existed, that a man who is unable to pay *all* of his creditors, ought not to be allowed fully to pay *some* of them, and wholly to neglect *others*.

While I have aimed at the utmost brevity, I hope that the classification of topics will be found tolerably clear.

Recent decisions have enabled me to correct the few errors which had crept into other treatises.

W. E. B.

New York, September 15, 1888.

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GENERAL ASSIGNMENTS.

Chapter I.

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General Assignment defined.—A general assignment, as provided for by the Assignment Acts of this State,

is a voluntary, absolute transfer by a debtor, of all his property in trust, for the benefit of all his creditors.

Royer Wheel Co. *v.* Fielding, 101 N. Y., 504.

Knapp *v.* McGowan, 96 id., 75.

Tiemeyer *v.* Turnquist, 85 id., 516.

Ginther *v.* Richmond, 18 Hun, 232.

It is voluntary, as without a consideration.—A deed, though it create a trust for the payment of the grantor's debts, is not a general assignment, if made upon a consideration.

Lewis *v.* Miller, 23 W. Dig., 495.

It is not Statutory.—It is *voluntary* also, in distinction from statutory assignments, which are provided for by insolvent laws.

Matter of Lewis, 81 N. Y., 421, 424.

Kelly *v.* Crapo, 45 id., 86.

It is deemed the assignor's own act, and not that of the law.

Warner *v.* Jaffray, 96 N. Y., 326.

General Assignment Acts not insolvent laws.—The general assignment statutes of New York, and of many other States, are not insolvent laws; they do not require assignments from debtors, but, assuming the right of the debtors to make them, provide secure and convenient modes by which the trusts which they create shall be executed and enforced.

Meyer *v.* Hellman. 96 U. S., 496.

Ludington's Petition, 5 Abb., N. C., 307.

Compare Kelly *v.* Crapo, 45 N. Y., 86.

Kelstadt *v.* Reilly, 55 How. Pr., 373.

An Assignment is Absolute. It is an absolute transfer.—The assignment must not contain a power of revoca-

tion, or other reservation or condition for the benefit of the assignor, so long as the creditors shall be unpaid.

Grover *v.* Wakeman, 11 Wend., 187.

Austin *v.* Bell, 20 Johns., 442.

Murray *v.* Riggs, 15 id., 571.

Hyslop *v.* Clarke, 14 id., 458.

Goodrich *v.* Downs, 6 Hill, 438.

The assignment cannot be modified by any subsequent agreement of the assignee.

Bell *v.* Holford, 1 Duer, 58.

It is in trust for creditors.—General assignments must be *in trust* for creditors; but it is not essential that the trust be expressly declared.

Burrill on Assignments, 5th Ed., § 122.

An assignment creates a trust for the single specific purpose of paying the assignor's debts out of the assigned property.

Pickett *v.* Leonard, 34 N. Y. 175.

The assignment may be in the form of a bill of sale and the trust be proved by parol evidence.

Britton *v.* Lorenz, 45 N. Y. 51.

It is a strong fact to show that an instrument is a bill of sale and not an assignment, that the second party undertakes *absolutely* to pay debts of the first, and not out of the proceeds of the property transferred.

Hine *v.* Bowe, 46 Hun, 196.

A transfer of property, real or personal, in trust to sell, and apply proceeds to the transferor's debts is

within the purview of Statutes regulating voluntary assignments.

Neilson v. Lagow, 12 How. 98.

Corn Ex. Nat. Bank v. Phila. Trust Co., 11 Phila., 510.

And differs from a security in that it absolutely conveys to the assignee both the legal and equitable title.

Martin v. Hausman, 14 Fed. Rep., 160.

The trust gives no title to creditors.—An assignment though in trust for creditors, gives them no title to the assigned property, but only a right to enforce the trust.

Jefferis's Appeal, 33 Penn. St., 39.

It is general and not partial.—An assignment is not necessarily void for conveying only a part of the debtors' property, and providing for only a part of his creditors.

Carpenter v. Underwood, 19 N. Y., 520. . .

But if it is partial, it is not within the application of the general assignment acts.

Knapp v. McGowan, 96 N. Y., 75.

Royer Wheel Co. v. Fielding, 101 id., 504.

The omission of worthless property, or if it be unintentional, does not prevent the assignment from being general and valid.

Shultz v. Hoagland, 85 N. Y., 464.

Assignments liberally construed.—Like other voluntary transfers and contracts, a general assignment is to be liberally construed so as to carry out the intentions of the assignor, with a presumption that such intentions are innocent and lawful.

Crook v. Rindskopf, 105 N. Y. 476.

Bagley v. Bowe, 105 N. Y., 171.

The right to make assignments.—The power of debtors to assign their property in trust for the benefit of creditors was early recognized in the courts of this State, independent of statute.

Dey v. Dunham, 2 Johns. Ch., 182 (1816).

Nicoll v. Mumford, 4 id., 522 (Kent, Ch).

Hawley v. Mancius, 7 id., 174.

And in the Federal Courts.

Brashear v. West, 7 Pet. 608 (Marshall C. J.)

And in the courts of other states.

Malcolm v. Hall, 9 Gill, 177.

Hall v. Denison, 17 Vt., 310.

State v. Maryland Bank, 6 Gill & J., 217.

Hoffman v. Mackall, 5 Ohio St., 124.

Object of the Assignment Acts.—The New York general assignment acts of 1860 and 1877 were adopted for the prevention of fraud by the assignor, and to supply a convenient procedure by which the assignee might be both held responsible and protected as a trustee, might be required to account, and might have his accounts adjudicated without the expense of a bill in equity.

Ludington's Petition, 5 Abb. N. C., 307, 312.

Fairchild v. Gwynne, 16 Abb. Pr., 23.

Who may make assignments.—All persons, not under disabilities either at common law or by statute, may assign.

Minors—An infant, according to the prevailing doctrine, who is a member of a firm, can join in a firm assignment.

Avery v. Fisher, 28 Hun, 508. *Ind.*

See *Slocum v. Hooker*, 15 Barb. 536.

And the firm assignment is valid if ratified by the infant partner at his majority.

Yates v. Lyon, 61 N. Y., 344.

Rev'g, 61 Barb., 205.

The former rule was that an infant could not make an assignment, on the ground that as it was voidable by him, it was not absolute and irrevocable.

Fox v. Heath, 16 Abb. Pr., 163.

Yates v. Lyon, 61 Barb., 205, 209.

Married Women.—A married woman having separate property engaged in her separate business may make an assignment; and it may be set aside for her own or her agents' fraud.

Warner v. Warren, 46 N. Y., 228.

Talcott v. Hess, 31 Hun, 282.

Matter of Hess, 48 Hun, 586.

Partnerships.—One partner can execute and acknowledge an assignment in the name of the firm with the consent of the other partner.

Klump v. Gardner, 15 N. Y. St. Rep., 100.

Lowenstein v. Flauraud, 82 N. Y., 494.

Consent of partners necessary.—*One or some* of joint debtors cannot assign the joint property.

Gates v. Andrews, 37 N. Y., 657.

No number of partners can assign without the consent of the others.

Wetter v. Schlieper, 6 Abb. Pr., 123.

One cannot assign for many without their consent.

Paton v. Wright, 15 How. Pr., 481.

Two of three partners cannot assign the firm property without the consent of the third.

Robinson *v.* Gregory, 30 N. Y., 350.

Fisher *v.* Murray, 1 E. D. Smith, 341.

Haggerty *v.* Granger, 15 How. Pr., 243.

And two of four cannot assign without the consent of the others.

Pettee *v.* Orser, 6 Bosw., 123.

Coope *v.* Bowles 42 Barb. 87.

Nor one of two without the other's consent.

Havens *v.* Hussey, 5 Paige, 30.

See Egberts *v.* Wood, 3 id., 517.

Consent of absconding partner.—If a partner absconds, his consent to assign is thereby implied.

Welles *v.* March, 30 N. Y., 344.

Kemp *v.* Carnley, 3 Duer, 1.

National Bank *v.* Sackett, 2 Daly, 395.

Palmer *v.* Myers, 43 Barb., 509.

Kelley *v.* Baker, 6 Abb. Pr., 531.

Supr consent.

But it is not implied from mere absence.

Pettee *v.* Orser, 6 Bosw., 123.

Coope *v.* Bowles, 42 Barb., 87.

Ratification may be equivalent to such consent.

Adee *v.* Cornell, 93 N. Y., 572.

Sheldon *v.* Smith, 28 Barb., 593.

And no one but the absent partner can question the validity of an assignment made without his consent.

Sheldon *v.* Smith, *supra*.

If a partner ratify an assignment of firm assets, a

creditor cannot question its validity because such partner did not join at first.

Adee v. Cornell, 93 N. Y., 572.

Rockafellow v. Miller, 107 id., 507. *not accepted partner.*

Consent of insane partner.—The temporary insanity of one partner does not authorize the other to make an assignment.

Stadelman v. Loehr, 47 Hun, 327.

Friedburgher v. Jaberg, 20 Abb. N. C., 279.

The partnership agreement may give authority to one partner to assign by providing that either may “dissolve and close up” upon certain conditions.

Roberts v. Shepard, 2 Daly, 110.

But it does not give such authority to a partner by assigning to him the duty of “conducting the financial settlements.”

Sweet v. Morrison, 103 N. Y., 235.

Consent of silent partner.—When a firm is insolvent, an assignment, without preferences, made by the general and active partners, will not be set aside by a court of equity, at the instance of a special or silent partner.

Robinson v. McIntosh, 3 E. D. Smith, 221.

Surviving partners may assign.—Surviving partners may make an assignment of firm property with the assent of the personal representatives of the deceased partner.

Emerson v. Senter, 118 U. S., 3.

Beste v. Burger, 13 Daly, 317.

Egberts v. Wood, 3 Paige, 517.

Williams v. Whedon, 39 Hun, 98; *aff'd* 109 N. Y. 333.

Such assignment may be attacked by the representatives of the deceased partner if made without their assent.

Nelson *v.* Tenney, 36 Hun, 327.

But not on that ground by the firm creditors.

Williams *v.* Whedon, *supra*.

Continuing partner may assign.—Where a surviving or continuing partner in good faith buys the interest of the retiring or deceased partner, the title vests in him as his private estate, free from any lien or equity of partnership creditors, and he may assign it, with or without preferences, as if it had always been his separate property.

Bates *v.* McNulty, 4 N. Y. St. Rep., 646.

Stanton *v.* Westover, 101 N. Y., 265.

Dimon *v.* Hazard, 32 *id.*, 65.

Smith *v.* Howard, 20 How. Pr., 121.

But such purchase is not in good faith if the firm is not solvent at the time of it.

Menagh *v.* Whitwell, 52 N. Y., 146.

Hard *v.* Milligan, 8 Abb. N. C., 58.

Heye *v.* Bolles, 2 Daly, 231.

Corporations may assign.—Corporations, trading or religious, may make assignments if not restrained by their charter or by statute.

De Ruyter *v.* St. Peter's Church, 3 N. Y., 238.

Banks have this power.

Haxtun *v.* Bishop, 3 Wend., 13.

Robinson *v.* Bank of Attica, 21 N. Y., 406.

Insurance Companies have it.

Hurlbut *v.* Carter, 21 Barb., 221.

Hill *v.* Reed, 16 Barb., 280.

Insolvent corporations cannot.—New York Corporations are prohibited from making assignments in contemplation of insolvency.

1 R. S., 603, § 4.

This prohibition applies to banks organized under the general banking law.

Robinson *v.* Bank of Attica, 21 N. Y., 406.

And to railroad companies.

Bowen *v.* Lease, 5 Hill, 221.

But does not apply to a corporation of another state.

Coats *v.* Donnell, 94 N. Y., 168, 178.

The fact that a corporation *is* insolvent, is not conclusive that the assignment is made "*in contemplation*" of such insolvency.

Paulding *v.* Chrome Steel Co., 94 N. Y., 334.

Dutcher *v.* Importers etc. Bank, 59 id., 5.

Robinson *v.* Bank of Attica, 21 id., 406.

If the assignment is made in contemplation of insolvency, it is utterly void, though it provide for ratable distribution among the creditors.

Libell *v.* Remson, 33 N. Y., 95.

Harris *v.* Thompson, 15 Barb., 62.

An assignment by a bank, after it has stopped payment, to an assignee other than an officer or stockholder, for the payment of the creditors in equal proportions is not void under the revised statutes.

Haxtun *v.* Bishop, 3 Wend., 13.

Insolvent moneyed corporations may not assign with preferences.

1 R. S., 591, § 9.

This prohibition applies to insurance companies.

Hurlbut v. Carter, 21 Barb., 221.

And to banking associations.

Curtis v. Leavitt, 15 N. Y., 9, 108.

Directors cannot assign without consent of stockholders.

Smith v. N. Y. Consol. Stage Co., 18 Abb. Pr., 419.

Who may be Assignees.—While the assignor may select his own assignees, yet they must be of sufficient character, intelligence and solvency to insure the proper execution of the trust.

They ought to be residents, and ought not to be blind, nor unable to read and write.

Cram v. Mitchell, 1 Sandf. Ch., 251.

Nor afflicted with chronic disease.

Currie v. Hart, 2 id., 353.

Nor insolvent.

Reed v. Emery, 8 Paige, 417.

Haggarty v. Pittman, 1 id., 298.

Connah v. Sedgwick, 1 Barb., 210.

The selection of such an incompetent assignee creates strong suspicion that the assignor intends to keep the control of the assigned property.

But now that the assignee is required to give a bond his insolvency is not so serious a disqualification, if he is a man of character and experience.

Pearce v. Beach, 12 How. Pr., 404.

Compare *Holmberg v. Dean*, 21 Kans., 73.

A co-partner cannot be assignee.

Sewall v. Russell, 2 Paige, 175.

See *Jackson v. Cornell*, 1 Sandf. Ch., 348.

Assignment takes effect on delivery.—An assignment duly executed and acknowledged takes effect, under the assignment act of 1877 as to property in this State, from the time of its delivery, and before it is recorded.

Nicoll v. Spowers, 105 N. Y., 1.

Warner v. Jaffray, 96 id., 248.

Brennan v. Wilson, 71 id., 502.

Syracuse, etc. R. Co. v. Collins, 57 id., 641.

McBlain v. Speelman, 35 Hun, 263.

It does not take effect under the assignment acts of 1860 and 1877 until it has been acknowledged by the assignor, though the assignee be in possession.

Hardman v. Bowen, 39 N. Y., 196.

Fairchild v. Gwynne, 16 Abb. Pr., 23.

Warner v. Jaffray, 96 N. Y., 248.

It seems that the assignment does not take effect until accepted by the assignee in writing; he cannot accept verbally.

Rennie v. Gage, 24 Hun, 123.

But see *McBlain v. Speelman*, 35 Hun, 263.

At common law, the acceptance of the trust by the assignee could be verbal, but merely taking the instrument into his hand did not amount to such acceptance.

Crosby v. Hellyer, 24 Wend., 280.

Bond not condition precedent.—The giving of the required bond by the assignee is not essential to the vesting in him of the assigned property.

Matter of Farnam, 75 N. Y., 187.

Thrasher v. Bentley, 59 id., 649.

Bostwick v. Burnett, 74 id., 317.

Ryan v. Webb, 39 Hun, 435.

If under the act of 1860 the failure to give a bond invalidated the assignment, that rule was changed by the amending act of L. 1875, c. 56.

Worthy *v.* Burham, 13 Hun, 176.

An assignee has no power to act, except to hold the property until he has given the bond.

Brennan *v.* Wilson, 71 N. Y., 502.

But he may ratify prior acts after he gives the bond.

Smith *v.* Newell, 32 Hun, 501.

Schedules not condition precedent.—Under the act of 1860 the making and delivery of verified schedules was essential to the validity of the assignment.

Juliand *v.* Rathbone, 39 N. Y., 369.

But that rule was changed by L. 1874, c. 600.

Produce Bank *v.* Morton, 67 N. Y., 199.

New York Assignment operates in other States.—By force of the Pennsylvania Statute a New York assignment does not take effect in Pennsylvania as against the lien of a “*bona fide* purchaser, mortgagee or creditor,” until it is recorded in the county there, where the property is.

Warner *v.* Jaffray, 96 N. Y., 248.

Green *v.* Van Buskirk, 7 Wall., 139.

A New York assignment with preferences is not valid in New Jersey as against attaching creditors of the assignor there.

Guillander *v.* Howell, 35 N. Y., 657.

In Massachusetts, the rule is, that if a foreign assignment, though voluntary, contain provisions not

permitted by the laws of that commonwealth, it will not prevail against the claims of domestic creditors.

Zipcey v. Thompson, 1 Gray, 243.

Ingraham v. Geyer, 13 Mass., 146.

Foreign Assignments take effect in New York.—An assignment by a debtor residing in another State or Country, valid there and not in conflict with the laws of this State, transfers the debtor's property here to the assignee, and as soon as he takes possession he can hold the same against attaching creditors here.

Ockerman v. Cross, 54 N. Y., 29.

A valid voluntary assignment under the laws of Ohio transfers personal property in New York to the assignee so that his title thereto prevails over the lien or claim of subsequent attaching creditors here.

Kelstadt v. Reilly, 55 How. Pr., 373.

Foreign Statutory Assignments not favored.—A distinction is made in the New York courts between such voluntary conveyances as general assignments are recognized to be, and compulsory transfers under insolvent or bankrupt laws, and it is held that a compulsory assignment under the Massachusetts Statute, does not prevail over the lien of creditors attaching property in New York under New York laws.

Kelly v. Crapo, 45 N. Y., 86.

Kelstadt v. Reilly, 55 How. Pr., 373.

The decision in *Kelly v. Crapo* was reversed by the Federal Supreme Court on the ground that the ship which was attached at New York was a portion of the territory of Massachusetts and passed by the insolvent assignment in the same manner as if physically within the bounds of that State.

Kelly v. Crapo, 16 Wall., 610.

Comity.—The rule of comity does not require the courts of a State to enforce the laws of another State, if they are in contravention of the laws and policy of their own State, and to the prejudice of their own citizens.

Edgerly v. Bush, 81 N. Y., 199.

A foreign creditor has the same rights here against the property of his non-resident debtor situate here, as a resident creditor has.

Hibernia Nat. Bank v. Lacombe, 84 N. Y., 367.

Though the statutory title of foreign assignees in bankruptcy has no recognition in this State, solely by virtue of the foreign statute, yet by the comity of nations such a title is recognized and enforced, when it can be done without injustice to the citizens of the State, and without prejudice to creditors pursuing their remedies here under our statutes, provided, also, such title is not in conflict with the laws or public policy of the State, and the foreign court had jurisdiction of the bankrupt.

Matter of Waite, 99 N. Y., 433.

While a foreign statutory assignment does not have preference over liens acquired by resident creditors.

Johnson v. Hunt, 23 Wend., 87.

Yet foreign *voluntary* assignments do prevail over the claims of subsequent domestic creditors.

Holmes v. Remsen, 20 Johns., 229, 260.

Though containing provisions which would render them void in this State.

Moore v. Willett, 35 Barb., 663.

What vests in the Assignee.—Under a general assignment everything assignable by the assignor passes

to the assignee, though not mentioned in the schedules, and though its existence be unknown to the assignee.

Emigrant, etc., Savings Bank v. Roche, 93 N. Y., 374.

Hegeman v. Hegeman, 8 Daly, 1.

And though indicated as generated in the schedules, and yet omitted in them.

Turner v. Jaycox, 40 N. Y., 471.

Platt v. Lott, 17 N. Y., 478.

Compare Wilkes v. Ferris, 5 Johns., 335.

If the schedules are prepared at the same time as the assignment to form part thereof, it is held that they control it, and that it is inoperative if they are not attached.

Moir v. Brown, 12 Barb., 49.

How Real Estate vests.—An assignment of real estate, is an express trust provided for by the Revised Statutes, and vests the whole estate thereof in the assignee, subject to the execution of the trust.

1 R. S., 729, §§ 55, 60.

People v. Bacon, 99 N. Y., 275.

And no title or interest therein remains in the assignor while the trust continues.

Briggs v. Davis, 20 N. Y., 15.

Marvin v. Smith, 46 N. Y., 571.

Assignee takes subject to equities and liens.—The assignee takes the assigned property subject to existing trusts, equities and liens.

Standard Wagon Co. v. Nichols, 41 Hun, 261.

See Hooley v. Gieve, 9 Daly, 104.

Assignee not a purchaser.—Not being a purchaser for value, he has no greater rights than the assignor.

Van Heusen v. Radcliff, 17 N. Y., 380.

Haggerty v. Palmer, 6 Johns. Ch., 437.

Slade v. Van Vechter, 11 Paige, 71.

Curtis v. Le N. Y., 195.

Reed v. Sands, 1 Barb., 185.

He takes subject to the rights of judgment creditors who may bring an action to set aside a fraudulent conveyance made by the assignor.

Stanwix Bank v. Leggett, 51 N. Y., 552.

Taft v. Wright, 2 Thomp. & C., 614; *affd.* 59 N. Y., 656.

He takes lands subject to an equitable lien in favor of the assignor's vendor.

Warren v. Fenn, 28 Barb., 333.

And personal property subject to the lien of an execution, which is in the sheriff's hands though there has been no levy.

Mumper v. Rushmore, 79 N. Y., 19.

Slade v. Van Vechten, 11 Paige, 21.

Warner v. Paine, 3 Barb. Ch., 630.

Mortgaged chattels pass to the assignee subject to the lien of the mortgage.

Sullivan v. Miller, 106 N. Y., 635.

Where the assignor has pledged certain notes to secure a creditor the assignee takes only the former's interest therein; the creditor has the right to collect the notes until he is paid.

Midgeley v. Slocomb, 2 Abb. N. S. 275.

Good-will and Trade Marks vests.—The proprietary right in a trade mark, or a *name*, or the *good-will* of a business passes to the assignee.

Hegeman *v.* Hegeman, 8 Daly, 1.

See Helmbold *v.* Helmbold, 53 How. Pr., 457.

Milliken *v.* Dart, 26 Hun, 24.

Bradley *v.* Norton, 33 Conn., 157.

Various examples and exceptions.—And so does an undertaking in claim and delivery.

Coffin *v.* McLean, 80 N. Y., 560.

And the assignor's contract for the manufacture of goods, if the assignee elects to accept them.

Van Dine *v.* Willett, 30 Barb., 319.

And causes of action for conversion and trespass.

Richtmeyer *v.* Remsen, 38 N. Y., 206.

Haight *v.* Hoyt, 19 id., 464.

Sherman *v.* Elder, 24 id., 381.

McKee *v.* Judd, 12 id., 622.

Whittaker *v.* Merrill, 30 Barb., 389.

And the assignor's right to a lease.

Crouse *v.* Frothingham, 97 N. Y., 105.

And the assignment of the lease also carries to the assignee the covenants and conditions which the lease contains.

Main *v.* Green, 32 Barb., 448.

The right to property or funds fraudulently transferred by the assignor vests in the assignee.

Becker *v.* Leonard, 42 Hun, 221.

And the right to attach a chattel mortgage executed by the assignor in fraud of creditors.

Ball *v.* Slatten, 98 N. Y., 622.

If the assignor, as the purchaser of goods, did not receive the bill of lading, then the assignee takes title to the goods, but without rights against the issuer of the bill of lading as carrier.

Tarbell v. Royal Ex. Shipping Co., 21 J. & Sp., 190.

Goods bought on credit by the assignor when insolvent, and with the design not to pay for them, and *in transitu* at the time of the assignment, do not thereby pass to the assignee.

Lacker v. Rhodes, 51 N. Y. 641; rev'g, 45 Barb. 499.

The rule that the assignee takes no better title than the assignor was applied where a sale of goods to the assignor was rescinded before the assignor got possession.

Flynn v. Ledger, 48 Hun., 465.

An assignment duly executed and delivered in another State passes personal property in this State to the assignee, the same as if made here, if there is no conflict of laws.

Nassau Bank v. Yandes, 44 Hun, 55.

Ockerman v. Cross, 54 N. Y., 29.

Kelstadt v. Reilly, 55 How. Pr., 373.

An assignment in one State does not pass to the assignee the personal property of the assignor in another State, if that would contravene the law and policy of the latter State.

Warner v. Jaffray, 96 N. Y., 248.

Government claims pass.—In the case of unjust capture by foreign nations, any claim of the assignee aris-

ing therefrom and recognized by the law of nations passes to the assignee.

United States v. Hunter, 5 Mason, 62.

Bachman v. Lawson, 109 U. S., 659.

Leonard v. Nye, 125 Mass., 455.

And so does any equitable claim against the United States.

Phelps v. McDonald, 99 U. S., 298.

Milnor v. Metz, 16 Pet., 221.

Though it cannot be judicially enforced.

Erwin v. United States, 97 U. S., 392.

A claim may pass to the assignee though it rest only upon the honor and justice of the government.

Milnor v. Metz, 16 Pet., 221.

Comegys v. Vasse, 1 Pet., 193, 213.

McBlair v. Gibbes, 17 How., 337.

Charitable claims do not pass.—A claim upon the mere charitable consideration of the government does not pass to the assignee.

Taft v. Marsily, 47 Hun, 175.

Trust funds do not pass.—Bonds or notes intrusted to the assignor merely for sale are impressed with a trust, and the title to them does not vest in the assignee for the purposes of the assignment.

Matter of Connor, 24 W. Dig., 217, aff'd 105 N. Y., 619.

The same is true of funds and checks intrusted to the assignor for a specific purpose.

People v. Bank of Rochester, 96 N. Y., 32.

Firm assignment and individual property.—An assignment of firm property, and not in terms embracing the individual property of the partners, does not convey the latter to the assignee.

Bell v. Holford, 1 Duer, 58, 74.

Morrison v. Atwell, 9 Bosw., 503.

Assent of Creditors not essential.—The assent of creditors is not necessary to render an assignment valid.

Nicoll v. Mumford, 4 Johns. Ch., 522.

Cunningham v. Freeborn, 11 Wend., 240.

Assent when presumed.—If the assignment is unconditional and for the benefit of creditors, their assent is presumed if they do not dissent.

Wheeler v. Sumner, 4 Mason, 183.

Assent how made.—Creditors sometimes assent to an assignment formally and directly by a notice in writing sent to the assignee.

Levy v. James, 16 N. Y. St. Rep., 762.

But more often by proving their claims under it.

Cavanagh v. Morrow, 67 How. Pr., 241.

A creditor does not however assent, by proving his claim upon the condition that the assignment be sustained.

Iselin v. Henlein, 16 Abb. N. C., 73.

Effect of assent.—The effect of such assent, as an estoppel, will be shown in Chapter II.

See page 42 , *post*.

Chapter II.

Void Assignments.—Who may attack them, and how.

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Void for authorizing compromise with creditors.	Void for appropriating firm property to individual debts.
Not for authorizing compromise with debtors.	Not void for appropriating individual property to firm debts.
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	Limited partnership preferences.
	WHO MAY ATTACK ASSIGNMENTS AND HOW.

Judgment creditors after execution.	No levy on proceeds of assigned property.
Receivers in Sup. proceedings.	Cannot attack under Act of 1877.
Must sue before assignee's discharge.	Creditor's action under the Code. When attachment will lie.
Assenting creditor cannot attack.	Strong exceptions to last rule.
Creditor not injured cannot.	Assignor not subject to arrest.
Attaching creditors at large cannot.	Inquiry as to assignments in supplementary proceedings.
Not sheriff in aid of attachment.	Assignee in bankruptcy can.
Sheriff may defend when sued.	

An assignment is *void on its face* if it contains provisions which are deemed to be certain indications of the assignor's fraudulent intent as to his creditors.

It may be valid on its face, and yet void, by reason of such fraudulent intent appearing from extrinsic evidence. It is this latent fraud, this collusion with relatives and favored creditors, and too often with the assignee, which have, from time immemorial, created a prejudice against voluntary assignments.

Boardman *v.* Halliday, 10 Paige, 223.

If the fraudulent intent appear on the face of the assignment it cannot be got rid of by showing that it will have no effect; e. g., by showing that there will be no surplus for the creditors not provided for.

Griffin *v.* Barney, 2 N. Y., 365.

Boardman *v.* Halliday, 10 Paige, 223, 230.

Void assignment is binding upon assignor.—An assignment may be void as against creditors in general, and yet binding upon the assignor, his representatives and assenting creditors.

Mills *v.* Argall, 6 Paige, 597.

Osborne *v.* Moss, 7 Johns., 161.

Validity not determined by Assignment Acts.—The Assignment Act of 1877 does not prescribe tests for

trying, or procedure for attacking the validity of an assignment.

Matter of Holbrook, 99 N. Y., 539.

Provisions of the Revised Statutes.—The Revised Statutes enact that all conveyances, transfers or assignments “made in trust for the *use of the person making the same shall be void* as against the creditors existing or subsequent.”

2 R. S., 135, § 1.

That every conveyance or assignment “made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands . . . as against the persons so hindered, delayed or defrauded, shall be void.”

2 R. S., 137, § 1.

Fraud a question of fact.—The question of fraudulent intent shall in all cases of assignments be deemed a question of fact and not of law.

2 R. S., 137, § 4.

Jacobs v. Remsen, 36 N. Y., 668, 669.

Ball v. Loomis, 29 id., 412.

Hauselt v. Vilmar, 76 id., 630.

A question for the jury.—The question of fraud upon extraneous facts must not be taken from the jury.

Bagley v. Bowe, 105 N. Y., 171.

The inference of fraud from the facts may be inevitable, so that it will be error not to make it.

Coleman v. Burr, 93 N. Y., 17, 31.

See Cunningham v. Freeborn, 11 Wend., 241.

Assignor's testimony as to fraud.—The assignor's tes-

timony when competent, that he assigned to gain time, is not conclusive as to fraudulent intent.

Griffin v. Marquardt, 21 N. Y., 121.

But easily becomes so by corroboration.

Work v. Ellis, 50 Barb., 512.

The assignor may testify as to his intent in his own behalf.

Lyman v. Wilson, 14 N. Y., 567.

Mathews v. Poultney, 33 Barb., 127.

As to his intent to gain time.

Griffin v. Marquardt, 21 N. Y., 121.

As to his intent to prevent the sacrifice of his property.

Forbes v. Waller, 25 N. Y., 430, 439.

When Assignor's declarations admissible.—The assignor's fraudulent intent cannot be proved by evidence of his declarations made subsequent to the assignment.

Cuyler v. McCartney, 40 N. Y., 221.

Coyne v. Weaver, 84 id., 386.

Peck v. Crouse, 46 Barb., 151.

Tilson v. Terwilliger, 56 N. Y., 273.

Flagler v. Schoeffel, 40 Hun, 178.

But his declarations are admissible if he continues in possession of the assigned property.

Newlin v. Lyon, 49 N. Y., 661.

Adams v. Davidson, 10 id., 309.

When conspiracy between assignor and assignee is proved all of their declarations and acts in pursuance thereof may be shown.

Newlin v. Lyon, 49 N. Y., 661.

Waterbury v. Sturtevant, 18 Wend., 353.

Crary v. Sprague, 12 id., 41.

Jones v. Hurlburt, 39 Barb., 403.

See Cuyler v. McCartney, 40 N. Y., 221.

The assignor's declarations made before the assignment are equally inadmissible as those made after—they are not part of the *res gestae*.

Bullis v. Montgomery, 50 N. Y., 352.

Assignor's fraud alone invalidates.—Assignment void for fraud of assignor though the assignee be in good faith.

Talcott v. Hess, 31 Hun, 282.

Work v. Ellis, 50 Barb., 512.

Rathbun v. Platner, 18 id., 272.

Mohawk Bank v. Atwater, 2 Paige, 54, 59.

Mead v. Phillips, 1 Sandf. Ch., 83.

Iselin v. Henlein, 16 Abb. N. C., 73.

Not void for fraud distinct from assignment.—Where the assignor fraudulently conceals his property from his assignee and creditors, the assignment is not void unless it is a part of the scheme or unless it aids in its furtherance.

Miller v. Halsey, 4 Abb. N. S., 28.

American Ex. Bank v. Webb, 15 How. Pr. 193.

The intent must be to defraud by *making the assignment*, and not by some independent act.

Wilson v. Forsyth, 24 Barb., 105.

A prior fraudulent disposition of his property does not of itself vitiate a subsequent assignment, for the assignee may recover it for the benefit of the creditors.

Wilson v. Berg, 88 Penn. St., 167.

• **Fraud must exist at time of execution.** The assignor's fraudulent intent must exist at the time the assignment was executed; his subsequent act, though proper to be considered as characterizing the original intent, will not invalidate the assignment.

Schultz v. Hoagland, 85 N. Y., 464.

Wilson v. Forsyth, 24 Barb., 105.

The fraudulent swelling of a preferred claim, after the assignment, does not, as matter of law, invalidate it.

Phillips v. Tucker, 28 W. Dig., 227.

After the assignee has taken possession under an assignment duly executed and delivered, no subsequent acts or omissions of the assignor can invalidate it.

Bell v. Holford, 1 Duer, 58.

Fraud not cured by subsequent acts. If the assignment is fraudulent when executed and delivered, it will not be rendered valid by assignor's subsequent acts.

Averill v. Loucks, 6 Barb., 470.

It cannot be made valid by an additional instrument.

Porter v. Williams, 9 N. Y., 142.

Metcalf v. Van Brunt, 37 Barb., 64.

When a second assignment is void. As a valid assignment is irrevocable after delivery to, and acceptance by the assignee, a second assignment of the same property is void, if the first has not been discharged.

Brennan v. Wilson, 71 N. Y., 502.

But if first is void, a second may be made.

Juliand v. Rathbone, 39 N. Y., 369.

Schwartz v. Soutter, 103 id., 683.

Construction must favor the assignment. If the assignment is susceptible of two constructions, that should be chosen which will support it.

Bagley v. Bowe, 105 N. Y., 171.

Coyne v. Weaver, 84 N. Y., 386.

Ginther v. Richmond, 18 Hun, 232.

If it does not in express terms authorize an illegal act to be done, the inference is that the assignor did not intend to authorize such illegal act.

Benedict v. Huntington, 32 N. Y., 219.

Townsend v. Stearns, id., 209.

Examples of favorable construction. An assignment which authorizes the assignee to sell for money, is not void because of a subsequent power to convey for "such consideration in money or other thing" as he may deem sufficient—all the clauses must be construed together.

Bagley v. Bowe, 105 N. Y., 171.

See *Crook v. Rindskopf*, id., 476, 485.

Nor is it void where there is a direction to the assignee to sell for money with all convenient speed, followed by a power "to sell and dispose of the assigned premises at such time and in such manner, as to him may seem to be most for the benefit and advantage of the creditors."

Townsend v. Stearns, 32 N. Y., 209.

Kellogg v. Slauson, 11 id., 302.

Wilson v. Robertson, 21 id., 587.

Giving the assignee such discretion as to disposition of the property, as the law gives him, does not avoid the assignment.

Jessup v. Hulse, 21 N. Y., 168.

Jacob v. Remsen, 36 id., 668.

E. G. directing him to convert the property "into cash as soon as the same may conveniently and properly be done."

Ogden v. Peters, 21 N. Y., 23.

Or "to sell without delay for the best price that can be procured."

Griffin v. Marquardt, 21 N. Y., 121.

Or to pay a certain amount to the sheriff in case an attachment is sustained.

Grant v. Chapman, 38 N. Y., 293.

But where the manner of sale is left to the discretion of the assignee he must not sell on credit or at retail.

Meacham v. Sterne, 9 Paige, 398.

Assignment not void for prohibiting a sale on credit.

Carpenter v. Underwood, 19 N. Y., 520.

Grant v. Chapman, 38 id., 293.

Delay incidental to execution of trust.—Assignment is not void because it will incidentally delay creditors in its execution. ✓

Hauselt v. Vilmar, 76 N. Y., 630.

Void for authorizing delay to sell.—An assignment is void against creditors if it authorizes the assignee to mortgage or lease the assigned property. ✓

Planck v. Schermehorn, 3 Barb. Ch., 644.

Or to sell the assigned property on credit.

Griffin v. Barney, 2 N. Y. 365.

Meacham v. Sterns, 9 Paige, 398.

Porter v. Williams, 9 N. Y., 142.

Nicholson v. Leavitt, 6 id., 510.

Burdick *v.* Root, id., 522.

Renton *v.* Kelly, 49 Barb., 536.

Or to sell for “money or *available means*” for this would create *delay*.

Brigham *v.* Tillinghast, 13 N. Y., 215.

Void for authorizing continuance of business.—An assignment is void if it postpones payment to creditors by authorizing funds to be employed in business or in the completion of considerable enterprises.

Dunham *v.* Waterson, 17 N. Y., 9.

Bodley *v.* Goodrich, 7 How., 276.

Stafford Nat. Bank *v.* Sprague, 17 Fed. Rep., 748.

Hill *v.* Agnew, 12 Fed. Rep., 230.

Schlüssel *v.* Willett, 34 Barb., 615.

Renton *v.* Kelly, 49 id., 536.

Exceptions.—But if such authority is not absolute but subject to supervision by the court it does not invalidate the assignment.

Watson *v.* Butcher, 22 W. Dig., 306.

Authority to assignee to sign firm name to checks, etc., does not invalidate the assignment where such power can only be used in the interest of the estate and auditors.

Beste *v.* Burger, 13 Daly, 317.

Void for authorizing compromise with creditors.—Authority to compromise with the creditors if in the opinion of the assignee it would be advantageous to the assignors and the creditors, has the effect to “delay” creditors and create a trust for the assignor, and therefore avoids the assignment under both provisions of the Revised Statutes before quoted.

McConnell *v.* Sherwood, 84 N. Y., 522.

Not for authorizing compromise with debtors.—An assignment is not void because it authorizes the assignee to compromise or compound with debtors in the exercise of sound decision. *description*

Ginther v. Richmond, 18 Hun, 232.

Coyne v. Weaver, 84 N. Y., 386.

McConnell v. Sherwood, 84 id., 522.

Bagley v. Bowe, 105 id., 171.

Woodburn v. Mosher, 9 Barb., 255.

When void for authorizing litigation.—Assignment is void for directing the assignee to defend suits brought against the assignor by his creditors or others.

Mead v. Phillips, 1 Sandf. Ch., 83.

Planck v. Schermerhorn, 3 Barb. Ch., 644.

Void for limiting Assignee's liability.—It is void if it stipulates the assignee shall be liable only for "gross negligence or wilful misfeasance."

Litchfield v. White, 7 N. Y., 438.

Void for creating use for Assignor.—And where, after providing for certain specified creditors, without making provision for others, the assignment directed reconveyance to the assignor.

Such an assignment could not be made good by showing that there would be no surplus to re-convey.

Barney v. Griffin, 2 N. Y., 365.

Goodrich v. Downs, 16 Hill, 438.

Strong v. Skinner, 4 Barb., 546.

Though such an assignment may not be void on its face, yet if it is shown that the assigned property exceeds in value the debts provided for and that the assignor contemplates a surplus, to revert to him, it is fraudulent and void.

Doremus v. Lewis, 8 Barb., 124.

Void for reservations.—An assignment is void which authorizes the assignee in his discretion to change the order of preferences.

Strong v. Skinner, 4 Barb., 546.

Or to give future preferences.

Boardman v. Halliday, 10 Paige, 223.

Barnum v. Hempstead, 7 id., 568.

Sheldon v. Dodge, 4 Den., 217.

See *Brainerd v. Dunning*, 30 N. Y., 211.

Or reserves, though by implication, the power to the assignor to give future preferences.

Hyslop v. Clarke, 14 Johns., 458.

Averill v. Loucks, 6 Barb., 470.

Kencheis v. Schloss, 49 How. Pr., 284.

Frazier v. Truax, 27 Hun, 587.

Void if conditional or coercive of creditors.—An assignment is void which is made upon the condition of the assignor's release.

Hyslop v. Clarke, 14 Johns., 458.

Berry v. Riley, 2 Barb., 307.

Austin v. Bell, 20 Johns., 442.

Renton v. Kelly, 49 Barb., 536.

Mead v. Phillips, 1 Sandf. Ch., 83.

Though such condition be secret and separate from the assignment.

Spaulding v. Strong, 36 Barb., 310.

But the assignment is not conditional and coercive where the creditors have already volunteered to give release.

Hastings v. Belknap, 1 Den., 190.

See *Powers v. Graydon*, 10 Bosw., 630.

Not void for compensating Assignee.—An assignment is not void for giving to assignees “a just and reasonable compensation for labor, time, services and attention” in the business of the trust.

Campbell *v.* Woodworth, 24 N. Y., 304.

Jacobs *v.* Remsen, 36 *id.*, 668.

But it is for giving a “counsel fee.”

Nichols *v.* McEwen, 17 N. Y., 22.

Not void for not expressing the whole trust.—An assignment is not void for omitting to express the whole trust created by the assignment statute, e. g., a preference in favor of employees. It is to be read with the statute.

Richardson *v.* Thurber, 104 N. Y., 606.

Bankrupt Act and Assignments.—Assignments in good faith and *without* preferences did not contravene, and were not void under, the National bankrupt act.

Haas *v.* O'Brien, 66 N. Y., 597.

Matter of Backer, 2 Abb. N. C., 379.

Matter of Stowell, 26 Hun, 258.

And the bankrupt act did not affect an assignment *with* preferences, if no proceedings in bankruptcy had been instituted.

Bostwick *v.* Burnett, 74 N. Y., 317.

Thrasher *v.* Bentley, 59 N. Y., 649.

A voluntary assignment made by a debtor, while proceedings are pending against him under the non-imprisonment act of 1831, is in fraud of that act and the prosecuting creditor.

Spear *v.* Wardell, 1 N. Y. 144.

Void upon extrinsic evidence of fraud.—Any device to cover up the property of the assignor for his benefit is fraudulent; the withdrawal of money or other property from the assignor's business or bank account on the eve of assignment, and the withholding it from the assignee without explanation, is sufficient to avoid the assignment.

White v. Fagan, 18 N. Y. W. Dig., 358.

Continued possession presumptive of fraud.—Continued possession of assigned property by the assignor is presumptive evidence of fraud, and becomes conclusive if not rebutted.

Ball v. Loomis, 29 N. Y., 412.

Cram v. Mitchell, 1 Sandf. Ch., 251.

Dolson v. Kerr, 5 Hun, 643.

Pine v. Pickert, 21 Barb., 469.

Assignment is void if the assignor keeps back from the assignee a considerable part of his property.

Viotor v. Henlein, 7 Cro. Pro., 67.

Iselin v. Henlein, 16 Abb. N. C., 73.

Fraudulent purchase prior to assignment, and retention of property from the assignee, may suffice to prove fraud.

Waverly Nat. Bank v. Halsey, 57 Barb., 249.

Kennedy v. Thorp, 3 Abb. N. S., 131.

Void if for use or benefit of Assignor.—An assignment is void if the assignor thereby, or at the same time therewith, reserves to himself any use or interest in, or control over the assigned property, before the debts are paid.

Collomb v. Caldwell, 16 N. Y., 484.

Grover v. Wakeman, 11 Wend., 190.

McConnell v. Sherwood, 84 N. Y., 522.

Berry v. Riley, 2 Barb., 307.

Sheldon v. Dodge, 4 Den., 217.

An assignment was adjudged void where the assignor stipulated with preferred creditors for a loan to his son who acted for him.

Haydock v. Coope, 53 N. Y., 68.

And where he stipulated for a certain annual payment to himself out of the trust.

Mackie v. Cairns, 5 Cow., 547.

But see *Austin v. Bell*, 20 Johns., 442.

And where he stipulated for his own employment therein at a salary.

Renton v. Kelly, 49 Barb., 536.

And where, for secret purposes, he provided for the payment of debts which did not exist, and were purely fictitious.

Mead v. Phillips, 1 Sandf. Ch., 83.

But the employment of the assignor by the assignee is not, of itself, sufficient to establish fraud in the assignment.

Wilbur v. Fradenburgh, 52 Barb., 474.

Browning v. Hart, 6 Barb., 91.

An assurance by the assignor to the assignee that he would aid him in closing up the assigned estate, and in fact aiding him, at the latter's request, are not at all conclusive of a fraudulent intent.

North Riv. Bank v. Schumann, 63 How. Pr.,

Provision for fictitious debts. A preference of, or provision for fictitious debts is fraudulent.

- 0000 *Talcott v. Hess*, 31 Hun, 282. 4 N. Y. St. Rep., 62.
 Chandler v. Powers, 9 N. Y. St. Rep., 169.
 Bostwick v. Menck, 40 N. Y., 383.
 Mead v. Phillips, 1 Sandf. Ch., 83.

So is preference to fictitious creditors in trust for real one.

Frazier v. Truax, 27 Hun, 587.

Preference to wife before assignment.—Payment of debt due to wife in contemplation of an assignment does not invalidate it.

Estes v. Gunter, 122 U. S., 450.

Nor does a conveyance of real estate to a trustee to secure such debt.

Bean v. Patterson, id., 496.

A husband may prefer his wife in an assignment, for rents or other income of hers collected and used by him under an agreement to account for it.

Lyon v. Zimmer, 30 Fed. Rep., 401.

See *Syracuse Chilled Plow Co. v. Wing*, 85 N. Y., 421.

Effect of assignor's solvency.—The assignor's solvency at the time he makes an assignment is not conclusive of his intent thereby to delay his creditors.

Ogden v. Peters, 21 N. Y., 23.

See *Knapp v. McGowan*, 96 id., 75.

But a large excess of assets may raise a presumption of such intent.

Northrop v. Livermore, 44 N. Y., 109.

And an assignment with preferences is void if the assignor is amply able to pay his debts.

Planck v. Schermerhorn, 3 Barb. Ch., 644.

Wholly void if fraudulent in part. An assignment is wholly void if fraudulent as to a part only of the property which it conveys: e. g. where there is an agreement that the assignor may sell or use for his own benefit, a part of the property assigned.

Russell v. Winne, 37 N. Y., 591.

Edgell v. Hart, 9 id., 213.

Mackie v. Cairns, 5 How., 547.

Goodrich v. Downs, 9 Hills, 438.

The assignment is equally void though the fraudulent agreement or provision be in a separate instrument.

Ward v. Lowry, 17 Wend., 492.

An assignment is wholly void if one of the preferred debts be not due.

Fielder v. Day, 2 Sandf., 594.

Or if a firm assignment provide for individual debts.

Granville Nat. Bank v. Cohn, 25 W. Dig., 437.

If no fraud appears, a valid trust of the assignment is not to be defeated by an invalid one disjunctively connected with it.

Darling v. Rogers, 22 Wend., 483.

Rogers v. DeForest, 7 Paige, 272.

The last rule applies where powers to sell or mortgage real estate are joined.

Van Nest v. Yoe, 1 Sandf. Ch., 4.

Darling v. Rogers, *supra*.

VOID PARTNERSHIP ASSIGNMENTS.

Void for want of consent.—Assignments not made by all of the partners, or without their consent, express or implied, are void.

Page *ante*.

Void for fraud of one partner.—The fraudulent intent of one partner renders the assignment void, whether or not participated in by the others.

Fourth Nat. Bank *v.* Burger, 15 N. Y. St. Rep., 101.

See Crook *v.* Rindskopf, 105 N. Y., 476, 481.

Void for appropriating firm property to individual debts.—A firm assignment preferring individual debts or appropriating firm property to the payment of individual debts is void.

Hurlbut *v.* Dean, 2 Abb. App. 428.

Wilson *v.* Robertson, 21. N. C., 587.

Heye *v.* Bolles, 2 Daly, 231.

Burton *v.* Tisdall, 4 Barb., 571.

Schiele *v.* Healy, 10 Daly, 92.

Grauville Nat. Bank *v.* Cohn, 25 W. Dig., 437.

Lester *v.* Pollock, 3 Rob., 691.

Hard *v.* Milligan, 8 Abb. N. C. 58.

So is a firm assignment preferring debts due to partners.

First Nat. Bank *v.* Wood, 45 Hun, 411.

A firm assignment is touched with fraud by a transfer of firm property, three days before, in payment of an individual debt.

Friedburger *v.* Jaberg, 20 Abb. N. Y. 282.

But debts may be preferred as firm debts though not originally contracted by the firm.

Turner v. Jaycox, 40 N. Y., 470.

See Williams v. Shelly, 37 id., 375.

And may be shown to be firm debts though ostensibly individual.

Turner v. Jaycox, *supra*.

An assignment of individual and firm property, though not void on its face for preferring individual debts, cannot be sustained unless the assignee show that the individual partners had property enough to pay their individual debts.

Knauth v. Bassett, 34 Barb., 31.

A firm assignment which first provides for the payment of firm debts, is not invalidated by then preferring certain individual debts out of individual shares.

Kirby v. Schoonmaker, 3 Barb. Ch., 46.

Nor is such an assignment as the last invalidated by providing for the *pro rata* payment of unequal individual debts out of the surplus.

Crook v. Rindskopf, 105 N. Y., 476.

But such an assignment is void if its effect is to appropriate the property of one partner to the payment of the debts of another.

O'Neil v. Salmon, 25 How. Pr., 246.

It may be shown that the individual debts do not exist, so that the provision for them cannot vitiate.

Turner v. Jaycox, 40 N. Y., 470.

Their non-existence must be affirmatively shown.

Hurlbut v. Dean, 2 Abb. App., 428.

Not void for appropriation of individual property to firm debts.—Though equity appropriates partnership property to partnership debts, and individual property to individual debts, yet the general equity of the separate creditors to have their debts first paid out of the individual property of the partners, does not amount to a lien, and a court of equity will not defeat an appropriation by a partner of his individual property to pay the debts of his firm.

Meech v. Allen, 17 N. Y., 300.

An assignment is not invalid because it appropriates individual property to payment of firm debts.

Haynes v. Brooks, 42 Hun, 528.

Becker v. Leonard, id., 221.

Smith v. Howard, 20 How. Pr., 121.

See *Crook v. Rindskopf*, 105 N. Y., 476, 482.

On the contrary, it has been held that the appropriation of individual property, by an insolvent partner, to firm debts is fraudulent and void as to his individual creditors.

Jackson v. Cornell, 1 Sandf. Ch., 348.

Void for reservation for Assignors.—An assignment of both firm and individual property, if it reserves the surplus to the assignors after payment of the firm debts, is void as to individual creditors.

Collomb v. Caldwell, 16 N. Y., 484.

Goodrich v. Downs, 6 Hill, 438.

A firm assignment is not invalid for not providing for the individual debts after payment of the firm debts.

Bogert v. Haight, 9 Paige, 297.

Not void for preferences.—A firm assignment is not void for creating preferences among the firm creditors.

Cushman *v.* Addison, 52 N. Y., 628.

Loeschigk *v.* Hatfield, 51 id., 660.

Limited partnership preferences.—An assignment with preferences by an insolvent limited partnership is void.

1 R. S., 767, § 21.

Mills *v.* Argall, 6 Paige, 577.

Van Alstyne *v.* Cook, 25 N. Y., 491.

Such an assignment is void if it provide for payment *pro rata* to special partner.

Mills *v.* Argall, *supra*.

Such an assignment with preferences being void, is no obstacle to a second assignment without preferences.

Schwartz *v.* Soutter, 103 N. Y., 683.

WHO MAY ATTACK ASSIGNMENTS, AND HOW.

Judgment Creditor.—A judgment creditor having exhausted his legal remedy by return of execution, may bring an action to set aside the assignment.

Forbes *v.* Waller, 25 N. Y., 430.

Renaud *v.* O'Brien, 35 id., 99.

White *v.* Fagan, 18 W. Dig., 558.

Iselin *v.* Henlein, 16 Abb. N. C., 73.

Where a creditor does not obtain his judgment against the assignor until after the assignment, he does not acquire a lien upon the assigned chattels, and cannot attack a mortgage thereon as fraudulent.

Dorthy *v.* Servis, 46 Hun, 628.

Sullivan *v.* Miller, 40 id. 516 ; *aff'd*, 106 N. Y. 635.

We understand by this
 For the title to such chattels having vested in the assignee under the assignment it would be of no avail to the creditor to set aside the mortgage. The same rule applies to a mortgage on real estate.

Spring *v.* Short, 90 N. Y. 538.

Receiver.—A receiver in supplementary proceedings may bring the action on behalf of judgment creditors.

Coope *v.* Bowles, 42 Barb., 87.

But in such an action, the assignment is to be set aside only so far as it shall be necessary to satisfy the judgments of the creditors, whom the receiver represents.

Bostwick *v.* Menck, 40 N. Y. 383.

Creditor must sue before Assignee's discharge.—A judgment creditor cannot bring action to set aside an assignment after discharge of assignee by the county judge.

McLean *v.* Prentice, 34 Hun, 504.

And the effect of the distribution was the same at common law.

Ames *v.* Blunt, 5 Paige, 13.

Assenting creditor cannot attack.—After creditors have assented to an assignment and required the assignee to proceed, they cannot attack it because of the preference of a fictitious debt of which they know at the time of the assent.

Levy *v.* James, 16 N. Y. St. Rep., 762.

If a creditor once recognizes the validity of the as-

signment and proceeds to an unqualified proof of his claim, he cannot thereafter attack it as fraudulent.

Cavanagh v. Morrow, 67 How. Pr., 241.

See *Hone v. Henriquez*, 13 Wend., 240.

But he does not acquiesce in the assignment by proving his claim upon the condition that the assignment be sustained as valid.

Iselin v. Henlein, 16 Abb., N. C., 73.

Creditor not injured cannot.—A creditor cannot attack an assignment as illegal if it is for his benefit—he must be injured.

Fox v. Heath, 16 Abb. Pr., 163.

Powers v. Graydon, 10 Bosw., 630.

Richardson v. Herron, 39 Hun, 537.

A firm creditor cannot attack an assignment because it may be injurious to an individual creditor.

Crook v. Rindskopf, 105 N. Y., 476.

Bogert v. Haight, 9 Paige, 297.

Scott v. Guthrie, 25 How. Pr., 512.

But see *O'Neil v. Salmon*, id., 246.

And only firm creditors can raise the objection that individual debts are to be paid out of firm assets.

Haynes v. Brooks, 17 Abb. N. C., 152.

A creditor cannot intervene as co-defendant with the assignee except on the ground of his misconduct.

Davies v. Fish, 47 Hun, 314.

Compare *Chandler v. Powers*, 25 Hun, 445.

Not attaching creditor or creditors at large.—An attaching creditor cannot bring a creditor's bill to set aside a fraudulent assignment.

Thurber v. Blanck, 50 N. Y., 80.

Webster v. Lawrence, 15 N. Y. St. Rep., 140.

Not sheriff.—And the sheriff cannot in aid of an attachment or of an execution.

Bowe v. Arnold, 31 Hun, 256.

Lawrence v. Bank of Republic, 35 N. Y., 320.

Sheriff may defend when sued.—But if sued for conversion the sheriff may defend his attachment on the ground of the invalidity of the assignment.

Flagler v. Schoeffel, 40 Hun, 178.

Grady v. Bowe, 16 W. Dig., 136.

Rinchev v. Stryker, 28 N. Y., 45.

S. S. 31 *id.*, 140.

Jacobs v. Remsen, 36 N. Y., 668.

Webster v. Lawrence, 15 N. Y. St. Rep., 140.

No levy on proceeds of assigned property.—Where property has been fraudulently assigned, the sheriff may levy upon it under his attachment or execution, but not upon its proceeds.

Matter of Foly, 10 Daley, 4.

Lawrence v. Bank of Republic, 35 N. Y., 320.

Lanning v. Streeter, 57 Barb., 33.

Cannot attack under Act of 1877. A creditor cannot attack an assignment by any proceeding under the assignment act of 1877.

Matter of Holbrook, 99 N. Y., 539.

Matter of Rindskopf, 16 Abb. N. Y., 316,
note.

Creditor's action under the Code.—Creditors may bring action to compel the discovery of property.

New Code C. P. § 1871.

When attachment will lie.—If the assignor abstract a portion of his property for his own benefit in contem-

plation of an assignment and withholds it from the assignee, it is ground for an attachment.

Vietor v. Henlein, 7 Civ. Pro. Rep., 67.

An attachment may issue on the ground that a debtor is about to make a general assignment with intent to defraud or as part of a fraudulent scheme.

Nat. Park Bank v. Whitmore, 104 N. Y. 297.

Strong exceptions to last rule.—The mere invalidity of an assignment does not show such an intent to defraud creditors as will sustain an attachment under § 636 of the Code of Procedure.

Milliken v. Dart, 26 Hun, 24.

See *Friend v. Michaelis*, 15 Abb. N. C., 354.

Choses in action in possession of the assignee cannot be attached though the assignment be fraudulent.

Smith v. Langmire, 24 Hun, 257.

This is the rule as to an assigned bond and mortgage.

Thurber v. Blanck, 50 N. Y., 80.

Lynch v. Casey, 52 id., 183.

To the contrary.

Mechanics', etc. Bank v. Dakin, 51 N. Y., 519.

And this is the rule as to proceeds of property fraudulently assigned.

Lawrence v. Bank of Republic, 35 N. Y., 320.

Assignor not subject to arrest.—Assignor is not subject to arrest because the assignment is void for want of schedules, or because it does not provide for the surplus, unless actual fraudulent intent be shown.

Birchell v. Shaw, 8 Abb. Pr., 53.

Spies v. Joel, 1 Duer, 669.

Inquiry as to assignment in supplementary proceedings. When an assignment is apparently fraudulent, the examination of the debtor in supplementary proceedings will not be restricted to property acquired since the assignment, but may include inquiries concerning the assigned property.

Seligman *v.* Wallack, 16 Abb. N. C. 317.

Schneider *v.* Altman, id., 312.

→ It is otherwise if an action to set the assignment aside for fraud has been brought.

Schloss *v.* Wallack, id., 319, *note*.

Assignee in bankruptcy can attack assignment.—An assignee in bankruptcy may bring an action in the United States District Court to set aside a voluntary assignment as fraudulent and void, and that the assigned property may be turned over to him.

Hunker *v.* Bing, 9 Fed. Rep. 277.

Chapter III.

Rights, Duties, and Liabilities of Assignees.

Assignee not mere agent of Assignor.	Liability for neglect to collect.
Assignee a trustee for creditors.	Assignee's duty to defend suits.
Assignee differs from Executor.	Liability for value of assigned property.
Assignee differs from Receiver.	Assignees acting in good faith are protected.
Assignee not an officer of court.	When not liable for costs.
Assignee compared with Sheriff.	When not liable for contempt of court.
Assignee can sue as individual.	Assignee's liability under the Code.
Assignment the measure of Assignee's power.	Assignee cannot appoint substitute.
Assignee's duty prescribed by law.	Accepting co-assignees must co-operate.
Legal duty of firm Assignee.	Liability of co-assignees.
Model Assignment not burdened with powers.	Assignment as against attachment.
Assignee's duty of ordinary prudence.	Assignment as against judgment.
Duty as to Assignor's fraudulent transfers.	Discharge of Assignees and Assignments.
Duty to preserve the property.	Assignment limitation of twenty-five years.
Duty to convert it into cash.	
Duty etc. as to rent.	
Assignee not to bid in assigned property.	
Liability for neglect to administer.	

Assignee not mere Agent of Assignor.—The assignee is not the mere agent of the assignor, and is not to be controlled by him in any payments under the assignment.

Pickett v. Leonard, 34 N. Y., 175.

Assignee a trustee for creditors.—Perhaps at common law the assignee was but the hand of the assignor in

the distribution of his estate ; but in New York, even before the subject was regulated by statute, the assignee was held to be a trustee for all non-dissenting creditors who were within the terms of the assignment.

Ludington's Petition, 5 Abb. N. C., 307.

The assignee, as their trustee, should be open with creditors, and give them information as to the property and affairs of the assignor and access to the books.

Manning v. Stern, 1 Abb. N. C., 409.

Assignee differs from Executor.—The assignee holds chiefly in the interest of creditors, and for these in hostility to the assignor ; and is first accountable to them. He differs in this respect from an executor.

Bullis v. Montgomery, 50 N. Y., 352, 359.

(FOLGER, J.)

Assignee differs from Receiver.—The assignee is the representative of the assignor ; he derives his authority from him and not from the court. He is thus distinguished from receivers, and assignees in bankruptcy.

Nicholson v. Leavitt, 6 N. Y., 510, 519.

Matter of Lewis, 81 N. Y., 421.

See Sullivan v. Miller, 106 id., 635, 642.

Where an assignee is removed, a receiver of the property, *pendente lite*, succeeds to his rights and in some degree to his duties.

Sullivan v. Miller, 106 N. Y. 635, 641.

Assignee not an officer of court.—An assignee is not an officer of court, and the assigned property is not *in custodia legis*.

Matter of De Forest, Court Journal, July 24, 1888.

Matter of Mumford, 5 N. Y. St. Rep., 303.
See Shipman's Petition, 1 Abb. N. C., 406.

Assignee compared with Sheriff.—The office and services of an assignee are likened to those of a sheriff under an execution.

Nichols *v.* McEwen, 17 N. Y., 22, 27.

Assignee can sue as individual.—Assignee can sue in his individual character; he is not required to sue as trustee.

Hoagland *v.* Frank, 48 N. Y., 686.

Assignment the measure of Assignee's power.—The power and duty of the assignee, and the court's control over him, are limited by the terms of the assignment; the court has no power to direct the assignee to pay a debt of the assignor secured by mortgage, in preference to others, if the assignment be silent as to such preference.

Matter of Lewis, 81 N. Y., 421.

And if the assignment provides for the payment of an usurious debt, the usury is thereby waived, though the assignee were the original creditor and has transferred it.

Chapin *v.* Thompson, 89 N. Y., 270.

Where a firm assignment was of "our property" to pay "our debts" and "reserving to ourselves" the surplus, it was held that neither the assignee or the courts could reach any of the individual property of the partners in any proceeding under or to enforce the assignment.

. Matter of Davis, 1 How. N. S., 79.

The assignee's duty being to uphold the assignment,

he cannot object that the preference of a creditor is fraudulent.

Matter of Ward, 10 Daly, 66.

But he may refuse to pay it on the ground it has been paid or released.

Matter of Schaller, 10 Daly, 57.

Assignee's duty prescribed by law.—The assignee's duty of prudence and diligence in the administration of the assigned property, is not regulated by the assignment, but by the general principles of law as to trustees.

Dunham v. Waterman, 17 N. Y., 9, 16.

Pickett v. Leonard, 34 id., 175, 177.

The assignee has no power to apply any part of the assigned property to any purpose other than the payment of debts, and any agreement so to apply it will not be upheld or enforced.

Bell v. Holford, 1 Duer, 58.

Legal duty of firm Assignee.—Upon the satisfaction of the debts of the firm, it is the legal duty of the assignee, in the absence of any express directions, to devote the surplus to the interest of the respective owners, in accordance with their legal rights.

Crook v. Rindskopf, 105 N. Y., 476.

Eyre v. Beebe, 28 How. Pr., 333.

The duty of the assignee is first to pay firm debts out of firm property, and individual debts out of individual property, in the absence of directions in the assignment.

Friend v. Michaelis, 15 Abb. N. C., 354.

See Murray v. Murray, 5 Johns. Ch., 60, 73.

The assignee must not pay a debt which he knows to be fictitious, though so directed by the assignment.

Brown v. Halsted, 17 Abb. N. C., 197.

Model Assignment not burdened with powers.—“An assignment drawn precisely as it ought to be will not undertake to speak to the assignee in regard to his duties under the trust.” While the law will not control the assignee in opposition to the will of the assignor, as expressed in the assignment, it will overthrow the assignment itself if creditors are thereby delayed or defrauded.

Ogden v. Peters, 21 N. Y., 23.

Generally it is a failure of duty on the part of the assignee, to do any act the authorizing of which would invalidate the assignment, if appearing on its face.

See *Levy's Accounting*, 1 Abb. N. C., 177, 181.

Assignee's duty of ordinary prudence.—The assignee being entitled to compensation, is bound to use ordinary prudence. If he carries on the assignor's business and incurs reckless expenses, they will be disallowed.

Matter of Dean, 86 N. Y., 398.

The assignee is liable for ordinary negligence; his trust being for the benefit of creditors, the assignor cannot by the terms of the assignment limit the assignee's liability to losses caused only by his “gross negligence or wilful misfeasance.”

Litchfield v. White, 3 Sandf., 545; aff'd, 7 N. Y., 438.

Olmstead v. Herrick, 1 E. D. Smith, 310.

See *Casey v. Janes*, 37 N. Y. 608.

If the assignee charge the estate for money laid out in repairs, he must prove that it was benefited thereby.

Duffy v. Duncan, 35 N. Y., 187.

Duty as to Assignor's fraudulent transfers.—An assignee may treat as void any transfer made by the assignor, "in fraud of the rights of any creditor," and bring the necessary actions therefor.

L. 1858, c. 384.

See *Miller v. Halsey*, 4 Abb. N. S., 28.

Matter of Carpenter, 45 Hun. 552.

The statute last cited dispenses with the necessity of any special or other lien in behalf of individual creditors; and an action by the assignee, to annul a fraudulent transfer by the assignor, may be brought for the benefit of simple contract creditors.

Southard v. Benner, 72 N. Y., 424.

He may file a bill to set aside a previous conveyance of real estate.

McMahon v. Harrison, 35 N. Y., 403.

He may attack a chattel mortgage given by the assignor where he was permitted by agreement to remain in possession.

Southard v. Benner, 72 N. Y., 424.

Ball v. Slaften, 98 id., 622.

He may attack a mortgage given by one partner of an insolvent firm to another at dissolution, as in fraud of firm creditors.

Hard v. Milligan, 8 Abb. N. C., 58.

But he cannot attack a chattel mortgage as fraudulent, because not filed.

Niagara Nat. Bank v. Lord, 33 Hun, 557.

Dorothy v. Servis, 46 id., 628.

Duty to preserve the property.—It is the assignee's duty to defend the assignment and preserve the assigned property from attack.

Noyes v. Blakeman, 6 N. Y., 567, 579.

And to bring replevin suits for that purpose.

Matter of Rauth, 10 Daly, 52.

Duty to convert it into cash.—A chief duty of the assignee is to convert the assigned property into cash with all reasonable expedition, and ordinarily he has no right to do this by carrying on the retail business of the assignor.

Levy's Accounting, 1 Abb. N. C., 177, 185.

Matter of Rauth, 10 Daly, 52.

Matter of Dean, 86 N. Y., 398.

If the assignee cannot sell the property immediately for its fair cash value at private sale, he should sell it at auction with reasonable notice to creditors, unless they all wish to have the sale delayed for the purpose of getting greater prices.

Hart v. Crane, 7 Paige, 37.

Duty and Liability as to Rent.—The assignee must act as a prudent owner would, in continuing to incur liability for rent of the assigned premises.

Matter of Edwards, 10 Daly, 68.

Compare Van Dine v. Willett, 38 Barb., 319.

He may repudiate the assignor's lease, and does not become liable for rent by going upon the premises long enough to dispose of the assigned property. Assignees were not liable where they occupied for that purpose thirty-six days.

Journey v. Brackley, 1 Hilt., 447.

See Carter v. Hammett, 12 Barb., 253.

If the assignee does not accept the lease or enter upon the premises, he does not become liable for rent by receiving rent from sub-tenants, not knowing it to be such.

Dennistoun v. Hubbell, 1 Bosw., 155.

He is liable to lessor if he occupies and collects the sub-rents.

Jones v. Hausmann, id., 168.

Assignee not to bid in assigned property.—The court will not grant permission to an assignee to bid at a sale of the assigned property, where his personal interest therein, which may be sacrificed, is only a claim which is disputed by the assignor, and the amount and validity of which have not been determined.

Matter of Black, 13 Daly, 21.

Liability for neglect to administer.—Assignee is chargeable on accounting for negligence in not recovering property fraudulently transferred by the assignor before the assignment, it being no defence for him that the creditors might have taken such action to recover, or that the assignee substituted in his place might have taken it.

Matter of Carpenter, 45 Hun, 552.

Liability for neglect to collect.—An assignee who has notice of a debt due the estate is liable if it is lost through his neglect to collect it. He must not wait for a request from the creditors.

Harrington v. Keteltas, 92 N. Y., 40.

But he is not liable for failure to bring an action for false representations made to the assignor, unless it clearly appear that he knew them to be false.

Matter of Geary, 13 Daly, 373.

See *Parker v. Connor*, 93 N. Y., 118.

Assignee's duty to defend Suits.—The assignee is not bound to defend suits for setting aside the assignment, unless the creditors interested therein indemnify him against expenditures.

Meyer v. Hazard, 17 N. Y. St. Rep., 26.

The assignor sometimes makes provision (as he may) for payment of present and prospective costs in suits affecting the assigned property.

Lentilhon v. Moffat, 1 Edw. Ch., 451.

Liability for value of assigned property.—*Prima facie*, the assignee is chargeable with the value of the property as it appears in the inventory. The burden is upon him to show that the actual value is less, and upon attacking creditors to show that it is more.

Matter of Wolff, 13 Daly, 481.

The assignee will be charged with the inventory value, if guilty of misconduct, and he fails to bring the best evidence he has, to show that the actual value was less.

Id.

The assignee cannot escape from his liability to show what has become of the assigned property, by the fact that he did not give the required bond.

Matter of Farnam, 75 N. Y., 187.

Assignees acting in good faith are protected.—Though assignment be void, the assignee will not be held accountable for proceeds of the assigned property, paid over to creditors, pursuant to assignment, before others have acquired liens.

Collumb v. Read, 24 N. Y., 505.

Averill v. Loucks, 6 Barb., 471.

Colburn *v.* Morton, 5 Abb. N. S., 308.

Ames *v.* Blunt, 5 Paige, 13.

Butler *v.* Stoddard, 7 id., 163.

Sullivan *v.* Miller, 106 N. Y., 635, 643.

He will be reimbursed or allowed what he properly pays on an outstanding mortgage.

Scanton *v.* Bender, 3 How. Pr., 185.

Sullivan *v.* Miller, *supra*.

But payments to himself or his firm will not be allowed.

Coope *v.* Bowles, 42 Barb., 87.

Bostwick *v.* Beizer, 10 Abb. Pr., 197.

If the assignee by mistake pays to a creditor a sum which he is not entitled to have, he may compel him by action to repay it.

Matter of Morgan, 99 N. Y., 145.

See Lupton *v.* Lupton, 2 Johns. Ch., 614.

An assignee cannot be compelled to fulfil the unperformed contract of his assignor to deliver goods.

Matter of Adams, 15 Abb. N. C., 61.

The assignee is accountable for moneys paid to a preferred creditor, after suit commenced by another to set aside the assignment.

Albert *v.* Back, 20 J. & Sp., 550;

Aff'd 101 N. Y., 656.

When not liable for costs.—When the assignee is not guilty of mismanagement or bad faith in prosecuting or defending an action on behalf of the assignee's estate he is not personally chargeable with costs.

Code C. P. § 3246.

Jack *v.* Robie, 48 Hun, 181.

See Hone *v.* De Peyster, 106 N. Y., 645.

When not liable for contempt of court.—Where an assignment is set aside as fraudulent, and upon the report of a referee, the assignee is ordered to pay a specific sum to the receiver, the order is capable of being enforced by execution under § 1240, C. C. P.; and the assignee cannot be imprisoned for contempt for disobeying the order.

Matter of Hess, 48 Hun, 583.

Myers v. Beeker, 95 N. Y., 486.

Assignee's liability under the Code.—If assignee refuse to pay money to a preferred creditor, as directed by order of court, he is liable to imprisonment under § 2268, C. C. P.

Matter of Brick, 13 Daly, 312.

His liability in such a case is like that of an executor.

See Baucus v. Stover, 89 N. Y., 1.

Matter of Snyder, 34 Hun, 302.

Seaman v. Duryea, 11 N. Y., 324.

Assignee cannot appoint substitute.—The assignment devolves a personal trust upon the assignee which he cannot delegate to others.

Small v. Ludlow, 1 Hilt., 189.

But he may employ necessary assistants and attorneys.

Mann v. Whitbeck, 17 Barb., 388.

VanDine v. Willett., 38 id., 319.

Casey v. Janes, 37 N. Y., 608, 612.

Accepting co-assignees must co-operate.—If several assignees accept, and are alive, and not regularly discharged, they must all join in a transfer, particularly of the real estate.

Brennan v. Wilson, 71 N. Y., 502.

See Moir v. Brown, 12 Barb., 39.

And must all unite in bringing any action for the estate.

Thatcher v. Candee, 4 Abb. App., 387.

Brinckerhoff v. Wemple, 1 Wend., 470.

Liability of co-assignees.—Generally co-assignees are not liable for each others' acts, except by force of special agreement.

Banks v. Wilkes, 3 Sandf. Ch., 99.

But one is liable, if he allows the other to retain funds which ought to be applied in execution of the trust.

Bates v. Underhill, 3 Redf., 365.

Or if he allows him to waste funds which have come into their joint possession and control.

Adair v. Brimmer, 74 N. Y., 539.

Monell v. Monell, 5 Johns. Ch., 283, 296.

Or if he allows him to receive funds which he ought not to have received.

Mumford v. Murray, 6 Johns. Ch., 1.

Or if he is passive, and leaves the sole control to the other.

Bowman v. Rainetaux, Hoff. Ch., 150.

He is also chargeable with trust funds lost through insolvency of a co-assignee who used same, or had power to use same, to his knowledge, in individual business.

Bruen v. Gillet, 44 Hun, 298.

Assignment as against attachment.—After the assignment takes effect by delivery to the assignee, the property thereby assigned cannot be validly attached by the assignors' creditors.

Turner v. Jaycox, 40 N. Y., 470.

Nor can it be taken in execution.

Pancoast v. Spowers, 20 J. & Sp., 523.

If the assignee takes possession after delivery of the assignment, his title is prior to that of a creditor whose attachment is subsequent, but levied prior to the recording.

McBlain v. Speelman, 35 Hun, 263.

Warner v. Jaffray, 96 N. Y., 248.

The sheriff acting under attachment, will not be enjoined, at the instance of an assignee from taking possession of the assignor's books and papers.

Bleier v. Davidson, 20 Abb. N. C., 207.
note.

And while the sheriff is in possession of such books, an attaching creditor has the right to examine them in matters relating to the attachment.

Brooke v. Foster, 20 Abb. N. C., 200.

Contra Garden v. Sabey, 10 W. Dig., 33.

In an action by the assignee against the sheriff, who has taken assigned property under attachment by creditors, he should not accept an offer of compromise made by such creditors, if it is opposed by the preferred creditors.

Matter of Goldschmidt, 10 Daly, 38.

Assignment as against judgment.—An assignment takes precedence over a judgment, as a lien upon the real estate of the assignor, if recorded before the entry of judgment.

Waterbury v. Sturtevant, 18 Wend., 353.

Discharge of assignees and assignments.—An assignee having once accepted the trust and taken title cannot

at pleasure divest himself of such title nor renounce the trust—he can be relieved only by a court of equity, or by the county and concurrent courts, under the powers conferred by the assignment acts.

Brennan v. Wilson, 71 N. Y., 502.

If he re-convey to the assignor, in contravention of his trust, the title still remains in him.

Briggs v. Davis, 20 N. Y., 15.

Generally while any of the assigned assets remain to be collected for the benefit of the persons entitled to share in the distribution, the trust is not ended and the trust duties continue; and the fact, that in the end such collection may inure mainly to the personal benefit of the assignee, does not destroy his title as trustee.

Stanford v. Lockwood, 95 N. Y., 582.

While any of the assignor's debts remain unpaid, and any of the assigned property remains unapplied, the assignment has not been discharged.

Emigrant etc. Sav. Bank v. Roche, 93 N. Y., 374.

Briggs v. Davis, 20 N. Y., 15.

Assignment limitation of twenty-five years.—Trusts created by assignments are to be deemed discharged at the end of twenty-five years, from the creation thereof and the assigned estate to be re-conveyed to the assignor, his heirs or devisees.

L. 1875, c. 545.

This statute applies to assignments made before as well as after its passage.

Kip v. Hirsh, 103 N. Y., 565.

N. Y. Steam Co. v. Stern, 46 Hun, 206.

Chapter IV.

The General Assignment Act of 1877, and Amendments.

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§ 1.—TITLE.

This act may be cited for all purposes as “The General Assignment Act of Eighteen Hundred and Seventy-Seven.”

L. 1877, c. 466, § 1. *Ch. 466, p. 2536 R.S. Vol. 4*

This act was passed and took effect June 16, 1877. It wholly superseded and repealed the pre-existing general assignment act of 1860 (L. 1860, c. 348), and its amending acts, except as to past and pending proceedings.

L. 1877, c. 466, § 28.

The amending acts of the said act of 1860 were the following :

- L. 1867, c. 860.
- L. 1870, c. 92.
- L. 1872, c. 838.
- L. 1873, c. 363.
- L. 1874, c. 600.
- L. 1875, c. 56.

Amendments to Act of 1877.—Subsequent acts which have amended and added to the act of 1877 are the following :

L. 1878, c. 318.

L. 1884, c. 328.

L. 1885, c. 380.

L. 1885, c. 464.

L. 1886, c. 283.

L. 1887, c. 503.

L. 1888, c. 294.

These assignment acts of 1860 and 1877 have no application to assignments of a part of the debtor's property, or for a portion of his creditors; they apply only to general assignments.

See cases cited page 4, *ante*.

§ 2.—EXECUTION AND RECORDING OF ASSIGNMENT.

Every conveyance or assignment made by a debtor of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, [and shall specifically state therein the residence and the kind of business carried on by such debtor at the time of making the assignment, and the place at which such business shall then be conducted, and if such place be in a city, the street and number thereof, and if in a village or town, such apt designation as shall reasonably identify such debtor].

Every such conveyance or assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and shall be recorded in the county clerk's office in the county where such debtor shall reside or carry on his business at the date thereof.

An assignment by co-partners shall be recorded in the county where the principal place of business of such co-partners is situated.

When real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated.

The assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of, or indorsed upon the assignment, before the same is recorded, and if separate from the assignment, shall be duly acknowledged.

L. 1877, c. 466, § 2, as amended by
L. 1888, c. 294.

The amendment is included in brackets, and took effect July 1, 1888.

The word Assignment defined.—Assignment, as used in this act of 1877 and amending acts, sometimes means the legal transfer of the debtor's property, and sometimes the written instrument of such transfer.

Richardson v. Thurber, 104 N. Y., 606.

At common law an assignment might consist of several deeds.

Mackie v. Cairns, 5 Cow., 547.

And can also under the Assignment Acts.

Van Vleet v. Slauson, 45 Barb., 317.

See *Wynkoop v. Shardlow*, 44 id., 84.

But a multiplicity of deeds is attended with great inconvenience, and danger of informality.

An assignment which was before the courts between 1845 and 1852 was contained in *thirteen* instruments. It would have been remarkable if a fatal defect could not have been found in some of them.

Nicholson *v.* Leavitt, 6 N. Y., 510.

Effect of clerical error.—An assignment is not invalid because of a clerical error requiring the party of the “first” part to take possession of the assigned property.

Smith *v.* Bellows, 3 N. Y. St. Rep., 305.

Execution by Agent.—An assignment may be executed in the name of the debtor by a duly constituted attorney.

Klump *v.* Gardner, 15 N. Y. St. Rep., 100.

Lowenstein *v.* Flauroaud, 82 N. Y., 494.

Substantially overruling

Adams *v.* Houghton, 3 Abb. N. S., 46.

See National Bank *v.* Sackett, 2 id., 286.

Appointment of Assignee.—At common law an assignment could be made for creditors without the appointment of an assignee.

Tompkins *v.* Wheeler, 16 Pet., 106.

But such is not the case under the present assignment act.

Acknowledgment essential.—Under the act of 1860 acknowledgment was essential to the validity of the assignment; the act was mandatory and not directory merely, as to the mode of execution.

Hardman *v.* Bowen, 39 N. Y., 196.

Fairchild *v.* Gwynne, 16 Abb. Pr., 23.

It is also essential under the act of 1877; and it must be in due form.

Smith v. Boyd, 10 Daly, 149.

Smith v. Sim, 14 Abb. N. C., 447.

To the contrary, as to form.

Claffin v. Smith, 15 Abb. N. C., 241.

It seems to be the opinion of the Court of Appeals that the requirement of the act of 1877 is mandatory as to acknowledgment.

Warner v. Jaffray, 96 N. Y., 248, 252.

(EARL, J.)

The acknowledgment is insufficient, if made before an officer who neither knows nor identifies the assignors.

Treadwell v. Sackett, 50 Barb., 440.

Jones v. Bach, 48 id., 568.

All partners must acknowledge.—All of the partners executing a firm assignment must acknowledge it.

Treadwell v. Sackett, 50 Barb., 440.

Cook v. Kelly, 14 Abb. Pr., 466.

An improper certificate of an acknowledgment may be corrected by the officer after the assignor's death.

Camp v. Buxton, 34 Hun, 511.

If the assignee administer, he cannot shield himself from liability by the objection of no acknowledgment.

Randall v. Dusenbury, 7 J. & Sp., 174.

The informality of the assignee's acknowledgment cannot be objected to by debtor of assignor.

Jones v. Howard Ins. Co., 10 N. Y. St. Rep., 120.

Creditor may take acknowledgment.—The officer taking the acknowledgment may be a notary public who is a preferred creditor.

Wendell v. Reves, 26 W. Dig., 239.

✓ **Recording not essential.**—Recording of the assignment is not essential to its validity.

Nicolls v. Spowers, 105 N. Y., 1.

Warner v. Jaffray, 96 id., 248.

McBlain v. Speelman, 35 Hun, 263.

Recording as to Real Property.—An assignment in New York County is not effectual as to real property conveyed by it, as against a subsequent purchaser in good faith and without notice, until it is recorded in the office of the register:

Wagner v. Hodge, 34 Hun, 524.

Simon v. Kaliske, 37 How. Pr., 249.

Recording where Assignor non-resident.—If the assignor is a non-resident, the assignment is properly recorded in the county where the property is situated.

Scott v. Guthrie, 25 How. Pr., 481.

Acceptance, how made.—If the assignment is a reciprocal indenture, the acceptance by the assignee arises from his execution of it, without terms of positive assent. An indenture differs from a deed poll which is executed by, and binding upon, the assignor only.

Scott v. Mills, 18 Abb. N. C., 330; *aff'd* 45 Hun, 263.

At common law, acceptance could be verbal, but required something more than mere manual possession of the assignment by the assignee.

Crosby v. Hillyer, 24 Wend., 280.

Acceptance before record essential.—It is essential to validity that the assent be embodied before the assignment is recorded; the defect will not be cured by making and recording assent separately, immediately on discovering the omission.

Schwartz *v.* Souther, 41 Hun, 325; aff'd 103

N. Y., 683.

Scott *v.* Mills, 18 Abb. N. C., 330.

Noyes *v.* Wernberg, 15 id., 164.

Delivery to Assignee essential.—Where an assignment though duly executed and acknowledged by both is not delivered to the assignee, but to the assignor's attorney to keep until further orders, or until the attorney shall think necessary to file it for the best interest of all the creditors, there is a reservation of power to revoke it which renders it void.

Reichenbach *v.* Winkhaus, 12 Daly, 525.

There is no delivery to the assignee while the assignment is not fully complete in the execution and acknowledgment.

Brackett *v.* Barney, 28 N. Y., 333.

Delivery of property? See forms. Example properly - Goods in wife's hands. Dow vs. Putnam 16 N.Y. 562. Wife's donee

§ 3.—INVENTORY OR SCHEDULE.

A debtor making an assignment shall, at the date thereof or within twenty days thereafter, cause to be made, and delivered to the county judge of the county where such assignment is recorded, an inventory or schedule containing

1. The name, occupation, place of residence, and place of business, of such debtor.

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2. The name and place of residence of the assignee.

3. A full and true account of all the creditors of such debtor, stating the last known place of residence of each, the sum owing to each, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same.

4. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law and in equity, with the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal as well as the actual value of the same according to the best knowledge of such debtor.

5. An affidavit made by such debtor, that the same is in all respects just and true. But in case such debtor shall omit, neglect or refuse to make and deliver such inventory or schedule within the twenty days required, the assignee named in such assignment shall, within thirty days after the date thereof, cause to be made, and delivered to the county judge of the county where such assignment is recorded, such inventory or schedule as above required, in so far as he can; and for such purpose said county judge shall, at any time, upon the application of such assignee, compel by order such delinquent debtor, and any other person to appear before him and

disclose, upon oath, any knowledge or information he may possess, necessary to the proper making of such inventory or schedule. The assignee shall verify the inventory and schedule so made by him, to the effect that the same is in all respects just and true to the best of his knowledge and belief. But in case the said assignee shall be unable to make and file such inventory or schedule, within said thirty days, the county judge may, upon application upon oath, showing such inability, allow him such further time as shall be necessary, not exceeding sixty days. If the assignee fail to make and file such inventory or schedule within said thirty days or such further time as may be allowed, the county judge shall require, by order, the assignee forthwith to appear before him, and show cause why he should not be removed. Any person interested in the trust estate may apply for such order and demand such removal. The books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any creditor. The county judge is authorized by order to require such debtor or assignee to allow such inspection or examination. Disobedience to such order is hereby declared to be a contempt, and obedience to such order may be enforced by attachment. The inventory or schedule shall be filed by said

county judge in the office of the clerk of said county in which said assignment is recorded.

L. 1877, c. 466, § 3, as amended by

L. 1878, c. 318, § 1.

✓ **Schedule not essential.**—Under section 3 of the act of 1877, the filing of the inventory within thirty days was essential to the validity of the assignment, both as to parties and creditors.

Matter of Leahy, 8 Daly, 124.

But that section was materially changed by the amending act of 1878.

See Warner *v.* Jaffray, 96 N. Y., 248, 252.

Under the act of 1860, the delivery of verified schedules within the time limited was essential to the validity of the assignment.

Juliand *v.* Rathbone, 39 N. Y., 369.

But the amending act of 1874 provided that the omission so to deliver schedules should not invalidate the assignment.

Produce Bank *v.* Morton, 67 N. Y., 199.

How name of parties etc. to be verified.

Ass. Rule 11, Com. Pleas, *post*.

Effect of Schedules.—The schedules reflect upon the assignment, and if they set forth as due to friends, debts which have been paid and discharged, they render it voidable for fraud.

Talcott *v.* Hess, 31 Hun, 282.

Terry *v.* Butler, 43 Barb., 395.

Overstatement of preferred debts in schedule creates

presumption of fraud against the assignor, which he must rebut.

Kavanagh *v.* Beckwith, 44 Barb., 192.

Schedule of preferred creditors.—A schedule of preferred creditors specifically referred to in the assignment should be attached to it, so as to form part thereof, before the assignment is acknowledged. If not so attached, and if filed without being acknowledged, the assignment will be void.

Franey *v.* Smith, 47 Hun, 119.

Kercheis *v.* Schloss, 49 How. Pr., 284.

Schedule of debts.—The inventory of debts need not state what the notes due by the debtor were given for.

Pratt *v.* Stevens, 94 N. Y., 387.

Each page of the schedules shall be signed, and the sheets fastened and indorsed.

Ass. Rule 9, Com. Pleas, *post*.

Contingent liabilities shall appear on a separate sheet.

Ass. Rule 13, Com. Pleas.

Recapitulation is required at end of schedules.

Ass. Rule 12, Com. Pleas.

Schedules may be amended on petition.

Ass. Rule 14, Com. Pleas.

Effect of Omissions.—An omission of assets from the schedules does not, of itself, make the assignment void; particularly if trifling, and not intentional.

Schultz *v.* Hoagland, 85 N. Y., 464.

Particularly if they are prepared by the assignee.

Denton *v.* Merrill, 43 Hun, 224.

The omission of valuable assets from the schedules raises a question of fraud, which the jury, and not the court must decide.

Bagley v. Bowe, 105 N. Y., 171; rev'g 18 J. & Sp., 100.

An assignment purporting to transfer all the debtor's personal property, is not to be defeated by omissions in the schedules, whether it refers to them or not.

Turner v. Jaycox, 40 N. Y., 470.

Platt v. Lott, 17 id., 478.

Emigrant Sav. Bank v. Roche, 93 id., 374.

See *Wilkes v. Ferris*, 5 Johns., 335.

Holmes v. Hubbard, 60 N. Y., 183.

The cause of the difference between the nominal and actual values is to be explained by affidavit.

Ass. Rule 8, Com. Pleas.

If schedules filed by assignee, an affidavit of assignee as to value required.

Ass. Rule 10, Com. Pleas.

§ 4.—ADVERTISEMENT FOR CLAIMS.

The county judge may, upon the petition of the assignee, authorize him to advertise for creditors to present to him their claims, with the vouchers therefor, duly verified, on or before a day to be specified in such advertisement, not less than thirty days from the last publication thereof, which advertisement or notice shall be published in two newspapers, to be designated by the county judge, as most likely to give notice to

the persons to be served, not less than once a week for six successive weeks, and, if it appears that any of such creditors reside out of the State, then in like manner in the State paper.

L. 1877, c. 466, § 4.

Before the assignment acts, there was no method by which the court could ascertain who were the creditors of the assignor except by advertisement, which was always directed by the interlocutory judgment.

Matter of Currier, 8 Daly, 119.

See *Kerr v. Blodgett*, 48 N. Y., 62.

An assignee is not to be discharged if he has not advertised for claims.

Ass. Rule 23, Com. Pleas.

Matter of Lewenthal, 10 Daly, 14.

Matter of Merwin, *id.*, 13.

Advertisement merely auxiliary.—The service by advertisement is intended to be auxiliary to, and not a substitute for, other known methods of service; and the court may properly require that in addition to such advertisement, a copy of the notice to present claims be mailed to each creditor, unless personal service be made.

Matter of Gilbert, 9 Daly, 479.

Ass. Rule 30 (31), Com. Pleas.

Advertisement is now to be made in a newspaper of the county where the assignment papers are required to be filed, instead of in the State paper.

L. 1884, c. 133, § 2.

§ 5.—ASSIGNEE'S BOND.

The assignee named in any such assignment shall, within thirty days after the date thereof, and before he shall have any power or authority to sell, dispose of or convert to the purposes of the trust any of the assigned property, enter into a bond to the people of the State of New York, in an amount to be ordered and directed by the county judge of the county where such assignment is recorded, with sufficient sureties to be approved of by such judge, and conditioned for the faithful discharge of the duties of such assignee and for the due accounting for all moneys received by him, which bond shall be filed in the clerk's office of the county where such assignment is recorded, but in case the debtor shall fail to present such inventory within the twenty days required, then the assignee, before the ten days thereafter shall have elapsed, may apply to said county judge by verified petition for leave to file a provisional bond, until such time as he may be able to present the schedule or inventory as hereinbefore provided.

L. 1877, c. 466, § 5.

Bond not a condition precedent.—The giving of the bond is not a condition precedent to the vesting of the assigned estate in the assignee; but until it is given, his trust is simply to take possession and hold the prop-

erty; he cannot convey it so as to give a good title to the purchaser.

Bostwick v. Burnett, 74 N. Y., 317.

Brennan v. Willson, 71 id., 502.

Syracuse etc. R. Co. v. Collins, 57 id., 641.

Conveyance by the assignee before he has given his bond is a nullity, and may be questioned by his successors, as well as by the creditors.

Woodworth v. Lyman, 22 Hun, 245.

A lease given by the assignee before filing his bond may be ratified by him after filing it.

Smith v. Newell, 32 Hun, 501.

Under the act of 1860, the title of the assignee was only inchoate until he gave his bond.

Juliand v. Rathbone, 39 N. Y., 369.

Hedges v. Bungay, 3 Hun, 594.

The assignment is not rendered void by the fact that the bond is irregular, or not duly approved by the county judge.

Thrasher v. Bentley, 59 N. Y., 649.

Form and requisites of Bond.—The bond shall be joint and several in form, and must comply with the requirements of section 812 of the Code of Civil Procedure.

Ass. Rule 15, Com. Pleas.

The bond required by the act of 1860 might be joint and several, and not joint only.

People v. White, 28 Hun, 289.

Sureties—Justification.—There may be one or more sureties. One must be a freeholder.

Ass. Rule 17, Com. Pleas.

The justification of sureties is in the discretion of the court.

Ass. Rule 16, Com. Pleas.

Using the money of the estate to procure sureties is such misconduct as justifies the assignee's removal.

Matter of Robinson, 10 Daly, 148.

Approval of Bond.—In New York County, it is essential that the bond be approved by a judge of the Common Pleas. Before the act of 1885, giving concurrent jurisdiction to the Supreme Court, the approval of the bond by a judge of the latter court was a nullity.

Matter of Robinson, 10 Daly, 148.

A special county judge having authority to perform the duties of county judge, may approve the bond.

Thrasher v. Bentley, 59 N. Y., 649.

The bond will not be approved unless the schedules are filed, or the reason shown by affidavit. The bond must specify the residence of the sureties, and the nominal and actual value of the assigned property must be shown by affidavit.

Gen. Rule 27, Com. Pleas.

Hun's Rules, 1888, p. 378.

Provisional Bond.—The reason why schedules cannot be filed and the necessity for a provisional bond, must be shown by affidavit.

Ass. Rule 18, Com. Pleas.

§ 6.—REMOVAL OF ASSIGNEE.

The county judge shall, in the case provided in section three, and may also, at any time, on the

petition of one or more creditors, showing misconduct or incompetency of the assignee, or on petition of the assignee himself, showing sufficient reason therefor, and after due notice of not less than five days to the assignor, assignee, surety and such other person as such judge may prescribe, remove or discharge the assignee, and appoint one or more in his place, and order an accounting of the assignee so removed or discharged, and may enjoin such assignee from interfering with the assignor's estate, and make provision by order for the safe custody of the same, and enforce obedience to such injunction and orders by attachment; and, upon his discharge upon his own application, such assignee's bond shall be cancelled and discharged. The new assignee shall give a bond, to be approved as above required. The county judge shall have power, by order, to require or allow any inventory or schedule filed to be corrected or amended, and also to require and compel, from time to time, supplemental inventories or schedules to be made and filed within such time as he shall prescribe, and to enforce obedience to such orders by attachment.

L. 1877, c. 466, § 6, as amended by

L. 1878, c. 318, § 2.

The amending act was passed May 22, 1878, and went into effect twenty days thereafter.

If the assignee neglects to file inventory and give bond, the proper course is to remove him and hold him to account.

Matter of Parker, 10 Daly, 16.

See *Ryan v. Webb*, 39 Hun, 435.

Equity power of removal.—The power of summary removal possessed by the county judge is not less than that of a court of equity.

Matter of Cohn, 78 N. Y., 248.

Removal for misconduct.—An assignee should be removed for misconduct for secretly selling the assigned property in bulk to one who is own partner, father-in-law and bondsman, on the day after filing his bond.

Matter of Wolff, 13 Daly, 481.

And for using the funds of the assigned estate to buy up the claims of the creditors for less than they would have received from the estate.

Matter of Coffin, 10 Daly, 27.

And for any disposal of such funds which he neglects to explain.

Matter of Mayer, 10 Daly, 143.

And for taking a bill of sale from the assignor before the assignment with intent to defraud the assignor's creditors.

Matter of Raymond, 27 Hun, 502.

And for negligence in failing to recover property, fraudulently transferred by the assignor before the assignment.

Matter of Carpenter, 45 Hun, 552.

And for any dealings with the assignor which create just suspicions of unfriendliness toward the creditors.

Manning v. Stern, 1 Abb. N. C., 409.

For administering the estate in the interest of the assignor.

Matter of Henlein, N. Y. D. Reg., July 21, 1884.

An assignee cannot be removed because of misconduct before the assignment.

It is not misconduct to accept the appraisal of a friend, if it be correct, rather than that of disinterested appraisers. Non-residence does not disqualify him.

Matter of McGarry, N. Y. D. Reg., Dec. 16, 1886.

Removal for Incompetence.—The fact that the assignee is acting as the attorney of the assignor's wife, in the collection of a claim against the assignor, renders him incompetent.

Matter of Cohn, 78 N. Y., 248.

So he may be removed where his domestic relations are such as to raise a conflict of duty.

Matter of Rauth, 10 Daly, 52.

Or where his intimate business relations with some of the creditors would serve to embarrass him in the execution of his trust.

Matter of Kaughran, 13 Daly, 526.

Notice of Removal.—The notice of not less than five days should be served upon the assignors in the State in the ordinary way; and upon any absent assignor, by depositing it in the post-office addressed to him at his

last known place of residence, giving double the time required, or ten days.

Matter of Cohen, 13 Daly, 310.

Assignee cannot be discharged without an accounting.

Matter of Horsfall, 5 Abb. N. C., 289.

See cases under § 20, *post*.

The schedules may be amended on application by verified petition.

Ass. Rule 14, Com. Pleas.

§ 7.—ADDITIONAL SECURITY.

The county judge may, upon his own motion or upon the application of any party in interest, and on such notice as he may direct to be given to the assignor, assignee and surety, require further security to be given whenever in his judgment the security afforded by the bond on file is not adequate.

L. 1877, c. 466, § 7.

§ 8.—FAILURE TO FILE BOND.

A failure to file any bond required by or under this act or the acts hereby amended, within the specified time, will not deprive the county judge of his power over the assignee or the trust estate.

L. 1877, c. 466, § 8.

§ 9.—ACTION ON BOND.

Any action brought upon an assignee's bond may be prosecuted by a party in interest by leave

of the court; and all moneys realized thereon shall be applied by direction of the county judge, in satisfaction of the debts of the assignor, in the same manner as the same ought to have been applied by such assignee.

L. 1877, c. 466, § 9.

Leave to sue under Code.—Section 1915 of the Code of Procedure applies to actions on assignees' bonds, and leave to sue will be granted to any creditor entitled thereto.

Matter of Stockbridge, 10 Daly, 33.

Liability of Sureties.—The sureties upon the bond of an assignee are not liable for his failure to account for assets, as required by a judgment in favor of creditors, declaring the assignment void as to them; sureties only bind themselves that the assignee shall do his duty under the assignment.

People v. Chalmers, 60 N. Y., 154.

The order directing the assignee to pay is *prima facie*, but not conclusive, evidence of his non-performance of his duty, in an action against the sureties.

People v. White, 28 Hun, 289.

The sureties will not be relieved from liability by the mere delay of creditors to call the assignee to account until after he has become insolvent.

People v. White, 28 Hun., 289.

Statute of Limitations.—The statute of limitations does not run, in favor of the sureties, against the claims of the assignor's creditors while the estate remains unsettled in the hands of the assignee.

People v. White, 28 Hun., 289.

§ 10.—DEATH OF ASSIGNEE.

In case an assignee shall die during the pendency of any proceeding under this act, or at any time subsequent to the filing of any bond required herein, his personal representative or successor in office, or both, may be brought in and substituted in such proceeding on such notice (of not less than eight days), as the county judge may direct to be given; and any decree made thereafter shall bind the parties thus substituted as well as the property of such deceased assignee, provided, however, that if such assignee die subsequent to the filing of his bond and before any proceedings may have been had thereunder, then the surety on such bond may apply to the county judge for an accounting, who may, on such terms as to him seem just and proper, appoint another assignee and release such surety.

L. 1877, c. 466, § 10.

Revival of proceedings.—Where an assignee died pending an accounting, there might be, prior to the act of 1877, a revival of proceedings against his successor and personal representatives.

Matter of Grove, 64 Barb., 526.

The trust does not descend.—The trust estate however does not descend to the assignee's next of kin or personal representatives.

L. 1882, c. 185.

If one of two assignees mingles trust funds with his

own so that they cannot be distinguished, and then dies, the surviving assignee cannot recover the trust funds, as such ; he can only come in *pari passu* with the creditors of the deceased.

Hart v. Buckley, 2 Edw. Ch., 70.

§ 11. CITATION TO ACCOUNT.

A citation may be issued to all parties, interested in the estate assigned, as creditors or otherwise, requiring them to appear in court on some day therein to be specified, and to show cause why a settlement of the account of proceedings of the assignee should not be had, and if no cause be shown, to attend the settlement of such account. The county court must issue all citations mentioned in this act which must be returnable in court. It may issue a citation on the petition of an assignee, at any time after the assignment or on petition of a creditor, or an assignee's surety, or an assignor, at any time after the lapse of one year from the date of such assignment, or where an assignee has been removed and ordered to account as hereinbefore provided.

L. 1877, c. 466, § 11, as amended by

L. 1878, c. 318, § 3.

Citation to be sealed and tested.—Citation to be under seal of court and tested by the clerk.

Ass. Rule 6, Com. Pleas.

Not required to be tested by the Chief Justice.

Matter of Davis, 10 Daly, 31.

Assignor when cited.—The assignor is entitled to citation where there is a composition, and the estate is to be re-assigned to him.

Matter of Hulbert, 9 Abb. N. C., 132.

Cited to "Appear in Court."—A citation requiring parties to appear "before one of the judges of this court at chambers," confers no jurisdiction, and cannot be amended.

Matter of Davis, 10 Daly, 31.

Citation not absolute at first.—The order, in the first instance, must be to show cause, and not absolute.

Matter of Cowing, 26 Hun, 214.

Application for, is a motion.—An application by a creditor for a citation to an assignee is a motion, carrying costs as such, and a subsequent application by the same party will not be granted until the costs of the former are paid.

Matter of Thorn, 10 Daly, 71.

Application for by Assignee.—There cannot be a citation by the assignee for a special accounting, e. g., requiring a creditor who has released him to attend and submit to a decree barring him from any further claim.

Matter of O'Brien, 16 W. Dig., 435.

Nor can there be such a citation by him where proceedings are pending in the Supreme Court to compel him to account.

Matter of Cromien, 10 Daly, 41.

A citation by the assignee will be dismissed with costs where he has not mailed notice to creditors.

Matter of O'Brien, 16 W. Dig., 435.

The fact that the petitioner is a creditor need not be established by a judicial proceeding in order to give the county court jurisdiction. The averment of the fact in the verified petition is sufficient though denied by the answering affidavit.

Matter of Farnam, 75 N. Y., 187.

An accounting should not be ordered on the application of a preferred creditor as to whom the assignment admits no indebtedness, but a reference may be directed to enable him to establish his position as creditor.

Matter of Scofield, N. Y. D. Reg., Nov. 28, 1883.

Citation lost by Laches.—Where there has been gross laches and delay on the part of assignor or creditor, a citation will not be granted to them, but they will be left to an action for accounting.

Matter of Darrow, 10 Daly, 141.

§ 12.—CITATION TO ASSIGNEE.

A citation issued on the petition of a creditor may be addressed to and served on the assignee alone, but on or after the return of such citation the assignee may have a general citation issued to all parties interested.

L. 1877, c. 466, § 12.

§ 13.—SERVICE OF CITATION.

A citation to all persons interested must be served on all parties other than the petitioner who are interested in the fund, including assign-

ors, assignees and their sureties, except that if the time limited by due advertisement for presentation of claims has expired before the issue of the citation, creditors who have not duly presented their claims need not be served.

In case the creditors of such assignor, who have proved their claims, exceed twenty-five in number, then the county judge, upon proof by affidavit that such creditors exceed such number, may by order direct such citation to be served on each creditor who has proved his claim, by depositing a copy of the same, at least thirty days prior to the return day thereof, in the post-office at the place where the assignee or assignees, or either of them, reside, duly inclosed and directed to each of such creditors, at his last known post-office address, with the postage prepaid; and by publishing such citation once a week for at least four weeks prior to such return day in one or more newspapers, to be designated by such county judge as most likely to give notice to such creditors.

L. 1877, c. 466, § 13, as amended by

L. 1878, c. 318, § 4.

The assignee having advertised for claims as required by the preceding section 4 is relieved from the necessity of giving notice of his accounting to such of them as have not presented their claims; but such claims are

not cut off if contained in the schedules and not assailed.

Matter of Currier, 8 Daly, 119.

But see Matter of Burdick, 10 id., 49.

Preferred creditors must be cited.—As a preferred creditor is not bound to present his claim, he is entitled to a citation though he has not presented his claim, and the time limited therefor has expired.

Matter of Gouy, 13 Daly, 413.

Service by mail.—Service of the citation by mail is not sufficient unless authorized by the court.

Matter of Schaller, 10 Daly, 57.

§ 14.—TIME OF SERVICE.

A citation personally served within the county of the judge or an adjoining county must be so served at least eight days before the return thereof; if in any other county, at least fifteen days before the return thereof.

L. 1877, c. 466, § 14.

§ 15.—SERVICE BY PUBLICATION.

The county judge may direct service to be made by publication when he is satisfied by affidavit or verified petition either that the person to be so served is unknown, or that his residence cannot, after diligent inquiry be ascertained, or that he cannot, after due diligence, be found within the State.

The order for such service must direct service of the citation upon such person to be made by publication thereof in one newspaper to be designated by the county judge as most likely to give notice to the person to be served, and also, if it appear that any such person resides without the State, then in the State paper for such length of time as he may deem reasonable, not less than once a week for six weeks, and that a copy of the citation be forthwith deposited in the post-office duly inclosed and directed to each person so served, at his last known place of residence or post-office address, and the postage paid thereon; at least thirty days before the return day thereof.

L. 1877, c. 466, § 15.

§ 16.—PERSONAL SERVICE WITHOUT THE STATE.

When publication has been ordered, personal service without the State made if within the United States at least thirty days, or without the United States, at least forty days before the return day, is equivalent to publication and mailing.

L. 1877, c. 466, § 16.

§ 17.—SERVICE ON MINORS.

Personal service upon minors and persons incompetent shall be made in the manner prescribed by

law for the service of citations issued by a surrogate, in cases of final accounting.

L. 1877, c. 466, § 17.

§ 18.—SERVICE ON CO-PARTNERS.

Personal service upon one of two or more creditors who claim as co-partners or otherwise as joint creditors shall be equivalent to personal service on all, and voluntary appearance either in person or by attorney shall be equivalent to personal service.

L. 1877, c. 466, § 18.

§ 19.—APPEARANCE.

On the return of a citation to all parties interested, any person claiming an interest, although not served, may appear, and become a party on duly presenting his claim.

L. 1877, c. 466, § 19.

§20.—ACCOUNTING.

On a proceeding for an accounting under this act the county judge shall have power:

1. To examine the parties and witnesses on oath in relation to the assignment and accounting and all matters connected therewith and to compel their attendance for that purpose and their answers to questions, and the production of books and papers.

2. To require the assignee to render and file an account of his proceedings, and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with the surrogate's order for an account.

3. To take and state such account, or to appoint a referee to take and state it; and such referee shall have the powers enumerated in subdivision one of this section.

4. To settle and adjudicate upon the account and the claims presented, and to decree payment of any creditor's just proportional part of the fund, or, in case of a partial accounting, so much thereof as the circumstances of the case render just and proper.

5. To discharge the assignee and his surety at any time, upon performance of the decree, from all further liability upon matters included in the accounting, to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement.

6. On proof of a composition between the assignor and his creditors, to discharge the assignee and his sureties from all further liability to the compounding creditors appearing or duly cited, and to authorize the assignee to release the assets to the assignor; provided, however, that if there be any creditors not assenting to the composition,

the judge shall determine what proportion of the fund shall be paid to or reserved for creditors not assenting, which shall not be less than the sum or share to which they would be entitled if no composition had been made, and may decree distribution accordingly.

7. To adjourn the proceedings from time to time, issue further citations if necessary, and amend the petition and proceedings thereon before decree in furtherance of justice.

8. To punish as for a contempt any disobedience or violation of any order made or process used in pursuance of this act or the acts hereby amended, and to restrain by arrest and imprisonment any party or witness when it shall satisfactorily appear that such party or witness is about to leave the jurisdiction of the court, and to take bail to secure the attendance of such party or witness, to be prosecuted under the order of the court in case of forfeiture by and for the benefit of the party in whose interest such examination shall be ordered.

9. To exercise such other or further powers in respect to the proceedings and the accounting therein as a surrogate may by law exercise in reference to an accounting by an executor or administrator.

L. 1877, c. 466, § 20, as amended by
L. 1878, c. 318, § 5.

Accounting before Assignment Acts.—Before the Assignment Act of 1860, the only mode of accounting was by a suit in equity in behalf of all interested in the assignment, who should, after due notice, prove their claims.

See *Matter of Bailey*, 58 How. Pr., 446.

Kerr v. Blodgett, 48 N. Y., 62.

The method of accounting, outlined in this section, is very similar to that in vogue under the old chancery practice. In a famous case which was in chancery fifty years ago, in which there were hundreds of creditors and claims amounting to more than a million of dollars, the assignees filed a bill against the assignor and creditors, for the purpose of ascertaining the debts and establishing the priorities among them, and a reference was decreed to one of the masters "to take and state an account": (1) of all property, money, etc., which had come into the hands of the assignees; (2) of all payments and disbursements made by them; (3) of all expenses incurred by them and of just allowances to be made to them for their services; (4) of the claims and demands against the debtor; (5) of the order of priority in which said claims were entitled to be paid.

Pratt v. Adams, 7 Paige, 615.

Accounting as a special proceeding.—An accounting is not a special proceeding governed by L. 1854, c. 270.

Matter of Risley, 10 Daly, 52, 56.

But see *Matter of Thorn*, id., 71.

Burden of proof.—The affirmative on the accounting to be with the assignee.

Ass. Rule 27, Com. Pleas.

Matter of Manahan, 10 Daly, 39.

Duffy v. Duncan, 35 N. Y., 187.

Bar to accounting.—The pending of actions in another court to set aside an assignment is not a bar to a proceeding in the Common Pleas to compel the assignee to account.

Matter of Dare, 13 Daly, 220.

But a proceeding in the Supreme Court for an accounting is such a bar.

Matter of Cromien, 10 Daly, 41.

Notice of Accounting—Parties.—A citation must be served upon all “persons interested, including assignors, assignees and their sureties.”

§ 13, *ante*.

Ass. Rule 23, Com. Pleas.

Ass. Rule 29, Com. Pleas.

Under the Assignment Act of 1860 it was not necessary for the creditor, moving for an accounting, to act for the other creditors, or to make them parties to the accounting.

Matter of Farnam, 75 N. Y., 187.

Harris *v.* Hollister, 64 *id.*, 1.

But where the creditors are very numerous one may bring the action for all if they have a common interest.

Code Civ. Pro., § 448.

And this was the rule in courts of equity.

Kerr *v.* Blodgett, 48 N. Y., 62.

Brooks *v.* Peck, 38 Barb., 519.

Thompson *v.* Brown, 4 Johns. Ch., 619.

Accounting discretionary.—The court may exercise discretion, and is not bound to compel an expensive accounting upon the application of a single creditor.

Matter of Bowery Nat. Bank, 1 Abb. N. C., 404.

An application for an accounting by the assignor or creditors will be refused, and the parties left to an action in equity, where no fraud is charged against the assignee, and where, after a great lapse of time, he would be put to great disadvantage in accounting.

Matter of Darrow, 10 Daly, 141.

Form of Account—Vouchers.—The account to be a debit and credit statement.

Ass. Rule 25, Com. Pleas.

The statement to be itemized and attended with vouchers.

Ass. Rule 26, Com. Pleas.

Vouchers for moneys paid out by the assignee are required, though the payees could not write, and it was not customary to give receipts therefor (wages).

Matter of Marklin, 10 Daly, 122.

Referee's limited powers.—If there is no opposition to the assignee's account, the referee should not inquire into its items; and the court will not withhold its allowance of the account on inquiries made by the referee of his own motion.

Matter of May, 13 Daly, 24.

The referee has no power to consider a claim made against the funds in the assignee's hands on the ground that he had converted goods of the claimants to the use of the assigned estate. Such a claim might be the subject of a trial under § 26, *post*.

Matter of Marklin, 13 Daly, 105.

Under the former act of 1860 as amended by L. 1872, c. 838, § 4, the authority to refer was limited to taking

and reporting the evidence ; the referee could not take and state the account of the assignee.

Matter of Morgan, 56 N. Y., 629.

Referee's report and fees.—The report is required to show all the jurisdictional facts and fully set out any items of the account which are disallowed.

Ass. Rule 29, Com. Pleas.

Referee must be sworn.—The referee must be sworn unless the oath is waived, or his report will be irregular.

Matter of Vilmar, 10 Daly, 15.

Code Civ. Pro., § 1016.

Confirmation of Report.—The referee makes his report on the account, and the judge may consider and confirm it at chambers on a non-enumerated motion.

Boegler v. Eppley, 40 Hun, 523.

Referee's report upon an accounting will not be confirmed without proof of service upon creditors to present claims, and of citation to the accounting.

Matter of Schaller, 10 Daly, 57.

Matter of Phillips, id., 47.

Ass. Rule 30, Com. Pleas.

On application to confirm report, the court cannot pass upon matters as to which no exceptions have been filed.

Matter of Rauth, 10 Daly, 52.

Upon filing of the referee's report and notice thereof to creditors who have appeared and proved their claims, the report will be confirmed if no exceptions are filed.

Rule 30, General Rules.

Matter of Scheu, 10 Daly, 11.

The report may be confirmed upon the consent of the creditors.

Matter of Weinhaus, 5 Abb. N. C., 355.

Referee's fees upon an accounting must be taxed if objected to.

Matter of Johnson, 10 Daly, 123.

He will be allowed the same as a referee in an action; he will be allowed for time spent in auditing accounts the same as for time in taking testimony.

Matter of Schaller, 10 Daly, 57.

Fees will not be allowed to the referee for inquiries made by him of his own motion.

Matter of May, 13 Daly, 24.

The referee not obliged to file his report until his fees are paid.

Matter of Elmore, 10 Daly, 48.

When a retiring assignee has done his duty and transferred the whole estate to his successor the latter should pay the referee's fees on the accounting.

Matter of Elmore, 10 Daly, 48.

But if he refuses to execute the trust, and retires to secure his own ends, he may have to bear the expenses of the accounting.

Matter of Edwards, 10 Daly, 68.

— Credits and debits to assignee.—Only reasonable expense in the management of the assigned estate will be allowed to the assignee, and the burden is upon him to show them to be reasonable.

Matter of Manahan, 10 Daly, 39.

The assignee will not be allowed for his expenditures unless he shows that the estate was benefited thereby.

Duffy v. Duncan, 35 N. Y., 187.

The assignee is to be credited for what he has paid on preferred claims whether proved or not under the assignment act.

Matter of Finck, 10 Daly, 100.

But not for payments on general schedule claims unless the same have been proved under the assignment act.

Matter of Bailey, 58 How. Pr., 446.

If the assignee carries on the retail business of the assignor he will not be allowed on accounting his expenses for rent, clerk and gas bills.

Matter of Rauth, 10 Daly, 52.

He cannot charge the estate with losses incurred in such business.

Matter of Dean, 86 N. Y., 398.

Matter of Petchell, 10 Daly, 102.

Matter of Marklin, id., 122.

But if the assigned property is sold at auction it is proper for the assignees to retain the assignor's store and to employ assistants there, if the assorting into parcels and cataloguing can be done better there than at the auction room—and such expenses will be allowed.

Matter of Marklin, id., 122.

Ass. Rule 20, Com. Pleas.

He will be charged with the value of the assigned property at the time he received it.

Matter of Orsor, 10 Daly, 26.

Matter of Marklin, 13 id., 105.

Or if not salable at once with its value when salable less the expense of storing, insurance, auction, etc.

Matter of Rice, 10 Daly, 1.

The value of the property with which the assignee is to be debited is, *prima facie*, as shown by the schedules.

Matter of Wolff, 13 Daly, 481.

If assignee uses the money of the estate to buy in claims against it for less than their ratable share he must account for the money so made.

Matter of Coffin, 10 Daly, 27.

Distribution among creditors.—Distribution of the proceeds of the assigned property among creditors comprises the whole object and end of the assignment, to which all the other proceedings are preliminary.

Burrill, Assignments, 5th ed., 678.

Pickett *v.* Leonard, 34 N. Y., 177.

Creditors must prove claims.—Creditors who have not proved their claims are not entitled to a distributive share, though such claims are specified in the schedules.

Matter of Bailey, 58 How. Pr., 446 (1880).

Matter of Burdick, 10 Daly, 49.

To the contrary.

Matter of Currier, 8 Daly, 119.

When a referee appointed to pass the assignee's accounts is authorized to fix the time when claims should be presented, he has the power to extend such time so as to entitle them to a distributive share in the assets.

Matter of Woodward, 67 How. Pr., 359.

Creditors specified in Schedules.—The schedules are to be regarded as part of the assignment so far as they designate creditors and the nature and amount of the debts.

Terry v. Butler, 43 Barb., 395.

And if the schedules agree with the assignor's books they will be more conclusive as to the true amounts of the debts than the statement of them contained in the assignment.

Kavanagh v. Beckwith, 44 Barb., 192.

Preferred Claims need not be presented.—A preferred claim is directed to be paid by the assignment, and must be paid though not presented.

Matter of Gouy, 13 Daly, 413.

Preferred debts if fraudulent.—It seems that a preferred debt though fraudulent must be paid by the assignee, if no creditor attacks the assignment or objects to such payment.

Matter of Ward, 10 Daly, 66.

Matter of McCallum, id., 72.

Wife may be preferred.—Where assignor had received his wife's money previous to the Married Woman's Act, and agreed to hold it as a loan, he may prefer her in his assignment.

McCartney v. Welch, 51 N. Y., 626.

Woodworth v. Sweet, 44 Barb., 268.

Wife as general creditor.—The wife may be paid her distributive share like the other creditors.

Zeigler's Appeal, 84 Penn. St., 342.

Usurious creditors.—The holders of usurious notes expressly provided for by the assignment are entitled

to their ratable shares (less usury), and cannot be objected to by other creditors who claim under the assignment.

Green v. Moore, 4 Barb., 332.

Pratt v. Adams, 7 Paige, 615.

But the assignment must be specific and clear in favor of the usurious debts.

Pratt v. Adams, 7 Paige, 615

See *Wright v. Clapp*, 28 Hun, 7.

And the assignor having made a specific provision for an usurious debt, cannot thereafter prevent its payment by the assignee to the extent of principal and legal interest.

Chapin v. Thompson, 89 N. Y., 270.

Claims of damages.—An unliquidated claim for damages is not provable against funds in the hands of the assignee.

Matter of Adams, 15 Abb. N. C., 61.

Claims subsequent to Assignment.—A debt subsequent to the assignment is not to be paid by the assignee.

Matter of Risley, 10 Daly, 44.

Rome Exchange Bank v. Eames, 4 Abb. App., 83.

And this rule applies to a note made by the assignor after the assignment, but antedating it.

Sheldon v. Smith, 28 Barb., 594.

Individual creditors under firm Assignments.—Under a firm assignment of partnership and individual property, if any partner be solvent, his individual creditors are to be paid in full with interest to the date of dis-

tribution, and then the surplus may be applied by the assignee to the partnership creditors.

Matter of Duncan, 10 Daly, 95.

Where payment of a joint and several note made by the assignor and two others formerly his partners, was demanded of the assignee and objected to by an individual creditor, on the ground that it was a firm debt and so not entitled to a share until after payment of individual debts, it was held that the burden was upon the objector to show that the note was in fact made for the benefit of the firm.

Matter of Waldron, 98 N. Y. 671.

Hostile creditors.—If a creditor elect to regard the assignment as invalid, he must adhere to his hostile attitude and cannot thereafter receive a dividend under the assignment.

See *Iselin v. Henlein*, 16 Abb. N. C., 73, 81.

Moller v. Tuska, 87 N. Y., 166.

Priority of U. S. debts.—Debts due to the United States must be paid first.

U. S. Rev. St., 1878, § 3466.

If not so paid first, the assignee becomes personally responsible in his property and person.

U. S. Rev. St., 1878, § 3467.

But the United States waives its claim by not making it before settlement of the estate.

United States v. Murphy, 15 Fed. Rep., 589.

Of State taxes.—The State may have an abstract right that taxes should be preferred, but the court will not compel the assignee to pay such taxes at the in-

stance of the assignor's mortgagee, where the assignment is silent.

Matter of Lewis, 81 N. Y., 421.

Of Lien creditors.—A creditor having a lien upon the assignor's estate, real or personal, is entitled to be paid, before the general creditors, out of the proceeds of the property which is subject to the lien.

Codwise v. Gelston, 10 Johns., 507.

Sullivan v. Miller, 106 N. Y., 635, 640.

A creditor having a special security must first exhaust it and then take his dividend upon the balance unpaid.

Besley v. Lawrence, 11 Paige, 581.

Dimon v. Delmonico, 35 Barb., 554.

A creditor having collaterals is entitled to enforce them, and also receive a dividend upon his claim as reduced by the proceeds of the collaterals. The court cannot order the sale of the uncollected collaterals, but only of the debtor's interest in them.

Midgeley v. Slocomb, 2 Abb. N. S., 275.

Of chattel mortgagees.—When a chattel mortgage becomes payable, the mortgagee is entitled (as against all persons not having a lien thereon) to receive the chattels from the assignee and sell them, and apply the proceeds to the payment of his debt.

Sullivan v. Miller, 106 N. Y., 635, 642.

Of trust creditors.—Where the assignor holds a fund for another under a specific appropriation of it for a particular purpose, it is still subject to the trust after it passes into the hands of the assignee, and the latter will be ordered to pay it over to the owner on his petition.

People v. Bank of Rochester, 96 N. Y., 32.

Matter of Le Blanc, 14 Hun, 8; aff'd 75 N. Y., 398.

Van Alen v. Amer. Nat. Bank, 52 N. Y., 1.

See People v. Merchants etc. Bank, 78 N. Y., 269.

A broker having bonds or notes of a customer for sale holds them as trustee or bailee, and if they pass to his assignee, the owner is entitled to receive them or their proceeds.

Matter of Connor, 105 N. Y., 619; aff'g 24 W. Dig., 217.

See Farwell v. Importers' etc. Bank, 90 N. Y., 483.

But the owner will have an equitable lien or preference upon the moneys in the hands of the assignee, only for the amount of his fund which actually passed into the hands of the assignee.

Matter of Cavin v. Gleason, 105 N. Y., 256.

Landlords have no priority.—The priority which landlords once had for the collection of rent was abolished in 1846.

L. 1846, c. 274.

Reynolds v. Ellis, 103 N. Y., 115, 122.

Consignor's equity.—A consignor estops himself from claiming of the assignee of his factor the proceeds of his goods, by filing his claim as an ordinary creditor and taking a dividend thereon.

Matter of Kobbe, 10 Daly, 42.

But if he can trace in the hands of the assignee any portion of the proceeds of his goods, not yet disposed of, he may recover it.

Matter of Kobbe, 10 Daly, 42.

See Cole v. Mann, 62 N. Y., 1.

It is discretionary with the court to order payment of the whole or part of a creditor's claim.

Matter of Ward, 10 Daly, 66.

A part payment of a debt by the assignee does not take it out of the statute of limitations.

Pickett v. Leonard, 34 N. Y., 175.

Equitable claims lost by laches.—Creditors having only equitable claims to or upon the assigned property must diligently proceed to enforce them while the property is undistributed, or they will lose their rights.

Sullivan v. Miller, 106 N. Y., 635, 643.

Accounting etc. essential to discharge.—There must be an accounting before the assignee can be discharged.

Ass. Rule 23, Com. Pleas.

If the assignee has taken possession of assets he is liable to account though no bond or schedule of creditors has been filed, and no designation of creditors was made in the assignment.

Ludington's Petition, 5 Abb. N. C., 307.

Matter of Farnam, 75 N. Y., 187.

Matter of Parker, 10 Daly, 16.

And there must be advertisement for claims and a citation to attend the accounting.

Matter of Merwin, 10 Daly, 13.

Matter of Lewenthal, id., 14.

Such advertisement, citation and accounting are essential even after a composition with the creditors and general release.

Matter of Yeager, Daly, 7.

Matter of Dwyer, 10 id., 8.

Matter of Graencke, id., 17.

Ludington's Petition, 5 Abb. N. C., 307.

The accounting is not waived by a provision in the composition deed that the assignee may apply for his discharge without notice to the compounding creditors.

Matter of Horsfall, 5 Abb. N. C., 289.

And the assignee is not exempt from accounting by having re-assigned all the assets to the assignor by order of the bankruptcy court.

Matter of Stowell, 26 Hun, 258.

Discharge refused for fraud.—If upon the face of the papers, the fraud of the assignee is indisputable, the court may refuse to discharge him and hold the proceedings open.

See Matter of May, 13 Daly, 24.

Decree upon accounting conclusive.—If all the creditors are duly cited to appear, then the decree upon accounting and distribution, upon the referee's report, is binding upon all, whether they appear or not; and the assignee, though knowing of a non-appearing creditor's claim, is not bound to have it proved.

Kerr v. Blodgett, 48 N. Y., 62.

The decree upon final accounting must specify all allowances to be paid to counsel.

Matter of Worthley, 10 Daly, 12.

An assignee is not discharged and his title as assignee is not divested until complete performance of the decree mentioned in this section.

Julien v. Lalor, 47 Hun, 164.

- . **Composition not personal to debtor.**—A composition between debtor and creditors is not personal to him, and may be carried out, after his decease, by his representatives.

Matter of Leslie, 10 Daly, 76, 89.

Right of creditor not compounding.—Creditors not joining in the composition are entitled to be paid on the final accounting only the proportion they would have received had no composition been made.

Matter of Orsor, 10 Daly, 26.

And this is the case though the composition took place in bankruptcy proceedings.

Matter of Stowell, 46 Hun, 342.

If any creditor is not cited as required by section 13 of this act he will be entitled to have the assignee's account re-opened, and the expense of the new hearing will be a personal charge upon the assignee.

Matter of Gouy, 13 Daly, 413.

Assignee must bear the expense of additional reference made necessary by his remissness at first.

Matter of Marklin, 10 Daly, 122.

Assignee not in contempt.—A final decree on account-ing directing the payment of money, being a judgment enforceable by execution, the court has no power to punish the assignee as for a contempt for not paying it.

Matter of Stockbridge, 10 Daly, 33.

Matter of Radtke, id., 119.

See Matter of Watson, 69 N. Y., 536.

§ 21.—EXAMINATION OF WITNESSES AND BOOKS.

The county judge may also, at any time, on petition of any party interested, order the examination of witnesses and the production of any books and papers by any party or witness before him or before a referee appointed by him for such purpose, and the evidence so taken, together with books and papers, or extracts therefrom, as the case may be, shall be filed in the county clerk's office, and may be used in evidence by any creditor or assignee in any action or proceeding then pending, or which may hereafter be instituted. No witness or party as above provided, shall be excused from answering on the ground that his answer may criminate him, but such answer shall not be used against him in any criminal action or proceeding.

Petition for, verified.—The petition must be regularly verified by the party interested.

Matter of Brown, 10 Daly, 115.

An affidavit of petitioner's attorney simply of his belief that the testimony of a witness is material to the matters concerned, is not sufficient to require the issuing of an order for his examination.

Matter of Holbrook, 99 N. Y., 539.

Examination must aid assignment.—An examination, the object of which is to discover evidence to set aside the assignment as fraudulent, cannot be had under the General Assignment Act.

Matter of Rindskopf, 13 Daly, 26.

Matter of Holbrook, 99 N. Y., 539.

Matter of Burtnett, 8 Daly, 363.

The examination should not extend to an inquiry as to whether the preferences are fraudulent, or as to what the assignors, prior to the assignment, did with borrowed money.

Matter of Burtnett, 8 Daly, 363.

Or as to prior misrepresentations made by the assignor to the petitioner.

Matter of Everit, 10 Daly, 99.

Matter of Goldsmith, id., 112.

But the examination is not to be refused merely because it may develop evidence sufficient to invalidate the assignment.

Matter of Kopelovich, 22 W. Dig., 13.

Matter of Wilkinson, 21 id., 265.

Creditors to inspect books.—Creditors should be allowed to inspect the books of the assignor, and require from him explanations as to his accounts and assets. Such examination is not hostile to the assignment.

Matter of Landaur, 22 Dig., 73.

Scope of examination.—An examination of the assignor may be had to ascertain what property belongs to the assigned estate.

Matter of Swezey, 10 Daly, 107.

He may be examined as to his property where he refuses to give up title deeds and to give information as to his assets, and his books are in confusion.

Matter of Strauss, 1 Abb. N. C., 402.

The assignee may be examined and compelled to pro-

duce the assignor's books and papers for inspection by creditors.

Matter of Bryce, 10 Daly, 18.

Limited powers of referee.—Under this section the county judge has power to appoint a referee to take and file testimony; he has no authority to direct the referee to report his opinion on the evidence, or to examine such witnesses or compel the production of such books and papers as the petitioner may require; the judge must in the order name the witnesses and the books and papers.

Matter of Holbrook, 99 N. Y., 539.

Matter of Ives, N. Y. Daily Reg., Sept. 14, 1887.

The examination may be had "at any time," though no proceeding under the act be pending; the examination itself is a "proceeding" under the act.

Matter of Bryce, 10 Daly, 18.

Every person interested in the estate who is required to submit to examination, or to produce books and papers, is a "party" to the proceedings.

Matter of Bryce, *supra*.

§ 22.—ORDERS AND DECREES—RECORDS.

All orders or decrees in proceedings under this act shall have the same force and effect, and may be entered, docketed and enforced and appealed from, the same as if made in an original action brought in the county court. And all proceedings under this act shall be deemed to be had in court. The said court shall always be open for

proceedings under this act. The county judge when named in this act, shall, in such proceedings, be deemed to be acting as the court. The clerk of the court shall keep a separate book, in which shall be entered each case, the date and place of record of the assignment, and a minute of all proceedings therein, under this act, with such particularity as the court shall direct by general order. He shall record therein at length the orders and decrees of the court, settling, rejecting or adjusting claims, and directing the payment of money, or releasing assets by the assignee, and removing or discharging the assignee and his sureties, and such other orders as the court shall direct by general order. The said clerk shall securely keep the papers in each case in a file by themselves, and shall be entitled to a fee of one dollar for filing all the papers in each case, and entering the proceedings in the minute book, and fifty cents, to be paid by the assignee, unless otherwise directed, for recording each order or decree required by this act or the general order of the court.

L. 1877, c. 466, § 22, as amended by

L. 1878, c. 318, § 6.

Examples.—A final decree on accounting directing the assignee to pay a sum of money, is a judgment to be docketed.

Matter of Stockbridge, 10 Daly, 33.

But a creditor to whom such a decree directs to be paid

a certain amount, cannot docket a judgment for the amount against the assignee personally.

Matter of Rosenback, 10 Daly, 128.

Ass. Rule 1, Com. Pleas.

The order or decree "releasing assets by the assignee," contemplated by this section, is only in cases where the assignee is willing to make the release; the court approves the release by way of protection to the assignee.

Matter of Potter, 44 Hun, 197.

§ 23.—COMPROMISE OF CLAIMS.

The county judge where the assignment is recorded may, upon the application of the assignee and for good and sufficient cause shown, and upon such terms as he may direct, authorize the assignee to sell, compromise or compound any claim or debt belonging to the estate of the debtor.

But such authority shall not prevent any party interested in the trust estate from showing upon the final accounting of such assignee that such debt or claim was fraudulently or negligently sold, compounded or compromised.

The sale of any debt or claim heretofore made in good faith by any assignee shall be valid, subject, however, to the approval of the county judge, and the assignee shall be charged with and be liable for, as part of the trust fund, any sum which might or ought to have been collected by him.

L. 1877, c. 466, § 23, as amended by

L. 1885, c. 464.

The application may be granted without a reference where the claim due the estate is so small as not to justify the expense of a reference.

Matter of Wooster, 10 Daly, 6.

Order of composition.—Under this section the judge may authorize the assignee to compound “any claim or debt” upon the particular facts of such debt, but cannot make a general order allowing him to compound such claims or debts as he may think proper to compound.

Matter of Ransom, 8 Daly, 89.

Notice of to creditors.—An assignee acting in good faith and with sound discretion may compromise a debt due the estate, but an order of court will not protect him unless granted upon notice to creditors.

Anon v. Gepelcke, 5 Hun, 245.

And the court may in its discretion order notice to creditors.

Matter of Youngs, 5 Abb. N. C., 346.

It is strong presumptive evidence against the good faith and judgment of an assignee, that he makes a compromise in spite of the opposition of his co-assignee.

Anon v. Gepelcke, *supra*.

But two of three joint trustees may compromise against the will of the third.

Murray v. Blatchford, 1 Wend., 583, 616.

Authority for in assignment.—An assignment is not fraudulent because it authorizes the assignee to compromise doubtful debts.

Dow v. Platner, 16 N. Y., 562.

Preferences in compositions.—Where creditors sign a composition in favor of their debtor, his agreement to prefer one of them therein is void, whether made before or after the signing.

Zoebis v. Von Minden, 47 Hun, 213.

Lawrence v. Clark, 36 N. Y., 128.

See *Nat. Park Bank v. Whitmore*, 40 Hun, 499.

The assignor's note for the balance given to a creditor as the condition of his signing the composition is void.

Breck v. Cole, 4 Sandf., 79.

A creditor cannot recover a claim existing at the time of the composition but not then taken into account.

Russell v. Rogers, 10 Wend., 474.

§ 24.—JURISDICTION OF COMMON PLEAS.

In the city and county of New York all papers, except assignments, which by this act are required to be hereafter filed or recorded in the county clerk's office, shall be filed or recorded in the office of the clerk of the Court of Common Pleas of said city and county; and any judge of said court may exercise all the powers of a county judge for said county for the purposes of this act, and any act or proceeding commenced or returnable before, or instituted or ordered by, one of the judges of said court, may be heard, continued or completed, by or before any other of them.

L. 1877, c. 466, § 24.

JURISDICTION OF THE SUPREME COURT.

An act to confer additional powers upon the Supreme Court of the State of New York and the justices thereof. Passed May 29, 1885.

Sect. 1. All powers, rights and duties conferred upon county courts and judges by chapter four hundred and sixty-six of the laws of eighteen hundred and seventy-seven, entitled "An act in relation to assignments of the estate of debtors for the benefit of creditors," and by acts amendatory thereof and additional or supplemental thereto, are hereby also conferred upon and shall be exercised by the supreme court and the justices of the supreme court of the state of New York concurrently with county courts and county judges. All applications under said acts made in the supreme court shall be made to the court, or a justice thereof, within the judicial district where the assignment is recorded, and all proceedings and hearings under said acts had in the supreme court upon the return of a citation shall be had at a special term of said court held in the county where the judgment debtor resided at the time of the assignment, or in case of an assignment by copartners, in the county where the principal place of business of such copartners was at the time of such assignment.

Sect. 2. This act shall take effect immediately.

L. 1885, c. 380.

✓ **"County judge" construed.**—The term "county judge" as used in the assignment act of 1860 and amending acts, included the Common Pleas judges, and conferred jurisdiction upon them when the debtor resided in the city of New York.

Matter of Morgan, 56 N. Y., 629.

The Supreme Court and other courts of equity have always had jurisdiction over assignees to compel them

to administer the assigned estate, and to account therefor.

The statutes last cited do not take away the jurisdiction of courts of equity over assignments and assignees; and an action to compel an assignee to account may be brought in the Supreme Court.

Hurth v. Bower, 30 Hun, 151.

Converseville Co. v. Chambersberg Co., 14 Hun, 609.

And in the Buffalo Superior Court.

Schuehle v. Reiman, 86 N. Y., 270.

Concurrent jurisdiction.—Where courts have equal and concurrent jurisdiction, the first action which is brought in behalf of all the creditors should be continued, and the Supreme Court may restrain the others.

Schuehle v. Reiman, 86 N. Y., 270.

Travis v. Myers, 67 N. Y., 542.

Rogers v. King, 8 Paige, 210.

If such an action or proceeding has been taken in the Supreme Court, the Common Pleas will make no order in the matter.

Matter of Cromien, 10 Daly, 41.

But pending suits in the Supreme Court to set aside the assignment will not be a bar to an accounting in the Common Pleas.

Matter of Dare, 13 Daly, 41.

§ 25.—JURISDICTION, AND EQUITY POWERS.

Any proceeding under this act shall be deemed for all purposes, including review by appeal or

otherwise, to be a proceeding had in the court as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders and decrees therein, unless the contrary be shown; and after the filing or recording of an assignment under this act, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein.

L. 1887, c. 466, § 25.

Under the act of 1860 the judges of the Court of Common Pleas did not have powers of court of equity, and an authority to perform acts not authorized by the assignment had to be obtained from a court of equity by a suit in equity.

Shipman's Petition, 1 Abb. N. C., 406.

Examples of Equity powers.—The county court has not jurisdiction upon the petition of a third person, controverted by the assignee, to render judgment awarding possession to the petitioner of the property claimed by him.

Such a proceeding being in hostility to the assignment, cannot be taken under the Assignment Act.

Matter of Potter, 44 Hun, 197.

But the court has jurisdiction, as a court of general equity jurisdiction, if the assignee seeks its direction, though the creditors be opposed to the petitioner's claim.

Matter of Bonner, 8 Daly, 75.

Power to correct mistakes.—Under this and other sections of the act of 1877, the county court has power, upon the accounting of the assignee, and upon a proper petition, to compel the restitution by a creditor of money improperly paid to him by the assignee, and to order its distribution.

Matter of Morgan, 99 N. Y., 145. *cf.*

Power over trust funds.—And the ^{subv.} court has power, upon petition of a *cestui que trust* of the assignor, to order the assignee to pay to him trust funds, or a specific fund, which had passed from the assignor to the assignee.

Matter of Connor, 24 W. Dig., 217 ; *aff'd* 105 N. Y., 619.

And it seems that such a petition is not a motion, but a special proceeding under the Code upon which costs may be awarded in the discretion of the court.

People v. Rochester City Bank, 96 N. Y., 32.

A creditor cannot claim a general lien and preference upon the fund in the hands of the assignee on the ground that he was a trust creditor of the assignor, unless such fund includes the proceeds of the trust estate.

Matter of Cavin, 105 N. Y., 256.

See Ferris v. Van Vechten, 73 N. Y., 113.

An attorney for creditors in the removal of the assignee is not entitled to an allowance out of the assigned estate, and this section gives no authority for granting it.

Matter of Manahan, 10 Daly, 39.

Ex parte orders avoided.—The court will not grant an *ex parte* order for the payment by the assignee of

moneys received from the assignor, to third persons entitled to them, but will order a reference, on notice to the creditors, to inquire into the facts.

Matter of Watson, 3 How., N. S., 313.

§ 26.—TRIAL. FEES. COMMISSIONS.

The court, in its discretion, may order a trial by jury or before a referee, of any disputed claim or matter arising under the provisions of this act, or the acts hereby amended. It may in its discretion award reasonable counsel fees and costs, determine which party shall pay the same, and make all necessary rules to govern the practice under this act. The assignee or assignees named in any assignment shall receive for his or their services a commission of five per centum on the whole sum which will have come into his or their hands.

L. 1877, c. 466, § 26, as amended by

L. 1878, c. 318, § 7.

In the trial of issues before a referee, an order "to hear and determine" is proper.

Matter of Fairchild, 10 Daly, 74.

The referee's determination cannot be reviewed at Special Term.

Matter of Fairchild, 10 Daly, 74.

But judgment cannot be entered upon the report of the referee, without confirmation or further direction by the court.

Matter of Potter, 44 Hun, 197.

What disputed claims referred.—The referee has power to try a claim made by a creditor and disputed by the assignor and in such a case the burden is upon the creditor.

Matter of Jeselson, 10 Daly, 104.

A claim by a third person of property, which the assignee holds as part of the assigned estate, made in hostility to the assignment, cannot be referred to a referee to hear and determine on the petition of the claimant.

Matter of Potter, 44 Hun, 197.

Upon an issue as to whether an assignee has paid a preferred creditor evidence tending to show that he has not paid another preferred creditor in the same class is incompetent.

Whitingham v. Dibble, 66 N. Y., 634.

Discretion as to fees.—The court will not exercise an unlimited discretion in awarding fees and costs, but it will adopt as its standard the bill of costs established by the Code.

Matter of Rauth, 10 Daly, 52, 57.

If the court, in its discretion, awards *any* costs, the rate will be as in ordinary actions.

People v. Fire Com'rs., 5 Abb. N. C., 144.

Extra allowances.—In addition to the usual costs of proceedings before and after trial and trial fee, the court may award the statutory allowance of five per cent on a trial before a referee.

Matter of Risley, 10 Daly, 44.

Matter of Fairchild, *id.*, 74.

Counsel fees.—A charge for attorneys' services in drawing the assignment will be allowed if provided for in the assignment.

Levy's Accounting, 1 Abb. N. C., 177, 187.

Matter of Van Horn, 10 Daly, 131.

He will be allowed for the costs of preparing formal papers required by the act, such as the order to advertise for creditors, the citation papers, papers required on final accounting the decree of discharge, etc.

Matter of Johnson, *supra*.

Matter of Watt, 10 Daly, 11.

And he may be allowed counsel fees for his attorney when he is sued for an accounting (\$70).

Jewett v. Woodward, 1 Edw. Ch., 195.

And for counsel fees in necessary replevin suits.

Matter of Rauth, 10 Daly, 52.

See Noyes v. Blakeman, 6 N. Y., 567, 579.

The costs to be allowed to the assignee for services of attorney on the accounting are to conform to the costs awarded by the Code on the trial of an issue of fact in a civil action.

Matter of Rauth, 10 Daly, 52, 56.

Halsey v. Amringe, 6 Paige, 12.

He is not to be allowed a counsel fee for drawing off his account in legal form.

Matter of Rauth, *supra*.

Burtis v. Dodge, 1 Barb. Ch., 77.

The assignee will not be allowed as a charge against the estate for the services of an attorney in drawing the assignment (unless specifically so provided in the deed)

or in preparing the schedules, inventory, assignees' bond, and attending to the advertising, and auction sales.

Matter of Carrick, 13 Daly, 181.

Matter of Johnson, 10 id., 123.

Nor will he be allowed attorneys' fees for "general advice and consultations."

Matter of Wolff, 13 Daly, 481.

Nor a "retainer fee."

Matter of Carrick, *supra*.

Matter of Van Horn, 10 Daly, 131.

The assignee though a lawyer cannot be allowed a counsel fee in addition to his commissions.

Nichols v. McEwen, 17 N. Y., 22, 25.

An attorney employed as general adviser of the assignee in respect to the assignment cannot charge a retainer in the suits he may have to try.

Matter of Schaller, 10 Daly, 57.

The assignee will not be allowed for attorneys' fees in defending suits, brought against the assignor after the assignment, nor in bringing improvident suits in the name of the assignor.

Levy's Accounting, 1 Abb. N. C., 177.

Nor for litigations in which he involved himself by continuing the assignor's business.

Matter of Van Horn, 10 Daly, 131.

No general charges for legal expenses will be allowed; the amounts must be specified, and shown to be necessary and reasonable.

Matter of Worthley, 10 Daly, 12.

Levy's Accounting, 1 Abb. N. C., 177, 182.

The assignee is not entitled to his expenditures in unsuccessfully defending suits to set the assignment aside.

Meyer v. Hazard, 17 N. Y. St. Rep., 26.

But see Noyes v. Blakeman, *supra*.

The assignee may make payments to his counsel upon his own responsibility, but the court will not make allowances for counsel until the final accounting.

Matter of Thomas, 5 Abb. N. C., 354.

Matter of Young, *id.*, 355, *note*.

Costs against losing party.—Costs will be awarded against a losing claimant.

Matter of Risley, 10 Daly, 44.

Costs may be awarded to assignee against claimant where the claim is reduced two thirds.

Olin v. Lockwood, 9 Daly, 68.

Commissions of Assignee.—The commission is to be computed on the money which the assignee receives, and not on the value of the assigned property. But the assignee may protect himself, before he accepts the assignment, by an agreement with the assignee as to the amount of his compensation in case of a composition. And when the assignee receives no money on which his commissions can be computed, his case is not provided for by the statute, and the court will order a reasonable compensation to be made to him, as a condition of the return of the assigned property.

Matter of Hulburt, 89 N. Y., 254.

Any special agreement for compensation the assignee must enforce against the assignor individually for he cannot enforce it against the estate on an accounting.

Boegler v. Eppley, 40 Hun, 523.

Assignee's commissions, in the absence of statute, are the same as those of executors and administrators, to be computed on the amount collected and paid out.

Matter of Shaw, 18 Hun, 195.

Campbell v. Woodworth, 24 N. Y., 304.

Barney v. Griffin, 2 id., 372.

Meacham v. Sternes, 9 Paige, 398.

The assignee is entitled to commissions on property paid to a creditor in lieu of cash.

Matter of Bassford, 13 Daly, 22.

Matter of Bunch, 12 Wend., 280.

Commissions may be refused to an assignee removed for grave misconduct.

Matter of Wolff, 13 Daly, 481.

And will not be allowed on moneys misappropriated by the assignee in buying up claims against the assignor for private speculation.

Matter of Coffin, 10 Daly, 27.

If removed for misconduct, he will not be allowed commissions, without regard to the *degree* of misconduct.

Matter of Danzig, 16 N. Y. St. Rep., 708.

And he will not be allowed the commission of five per cent. where the assignment is set aside for fraud.

Dexter v. Adler, 1 N. Y. Supplement., 684.
(June, 1888).

Hunker v. Bing, 9 Fed. Rep., 277.

In the case last provided for, the voluntary assignee will be allowed the necessary expenses of administering the estate while in his hands, but no compensation for his own services, if that result in a duplication of com-

missions by payment of full fees to two successive assignees.

In re Kurth, 17 Nat. B. R., 573.

As to compensation in such cases the voluntary assignee may be allowed nothing.

Burkholder v. Stump, 4 Nat. B. R., 597.

Or he may receive *pro rata* with the other creditors.

In re Lains, 16 Nat. B. R., 168.

§ 27.—INTERPRETATION.

Whenever words in this act importing the plural number are used in describing or referring to any matters, parties or persons, any single matter, party or person shall be deemed to be included, although distributive words may not be used; and when any singular matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included, unless otherwise specially provided or unless there be something in the subject or context repugnant to such construction.

L. 1877, c. 456, § 27.

§ 28—REPEALING CLAUSE.

Chapter three hundred and forty-eight of the laws of eighteen hundred and sixty, entitled "An act to secure to creditors a just division of the

estates of debtors, who convey to assignees for the benefit of creditors," and the several acts amendatory thereof, are hereby repealed, but this shall not affect any proceedings had; and any proceedings pending under the acts hereby referred to may be continued under this act.

L. 1877, c. 466, § 28.

§ 29.—PREFERENCE OF WAGES AND SALARIES. *sf*

In all distributions of assets under all assignments, made in pursuance of this act, the wages or salaries actually owing to the employees of the assignor or assignors at the time of the execution of the assignment shall be preferred before any other debt; and should the assets of the assignor or assignors not be sufficient to pay in full all the claims preferred, pursuant to this section, they shall be applied to the payment of the same pro rata to the amount of each such claim.

L. 1877, c. 466, § 29, as amended by

L. 1884, c. 328, and

L. 1886, c. 283.

The last act took effect May 6, 1886.

This preference is statutory.—This preference of employees does not require to be expressed in the deed—it is impressed by the statute upon the trust fund in the hands of the assignee.

Richardson v. Thurber, 104 N. Y., 606 (1887).

Burley v. Hartson, 40 Hun, 121.

To the contrary.

Smith v. Hartwell, 28 W. Dig., 239 (1888).

These statutes imposing a preference in favor of employees upon a voluntary assignment are not unconstitutional; the legislature may impose conditions.

Richardson v. Thurber, 104 N. Y., 606.

These acts are directed to the assignee rather than to the assignor, and the duty of the assignee towards employees is prescribed by these acts rather than by the assignment.

Burley v. Hartson, *supra*.

What employees preferred.—An employee of the assignor, whose wages are unpaid at the time of the assignment, is entitled to a preference, though he ceases to be an employee prior to that time.

Matter of Heath, 46 Hun, 114.

And an employee does not lose his preference by taking a note for the wages due, unless there be a specific agreement that the note is taken as payment.

Matter of Heath, 46 Hun, 114.

§ 30.—LIMITED PREFERENCES.

2) In all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preference created therein (other than for the wages or salaries of employees under chapter three hundred and twenty-eight of the laws of eighteen hundred and eighty-four and chapter two hundred and eighty-three of the laws of eighteen hundred and eighty-six) shall not be valid except

to the amount of one third in value of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one third of the assets of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then said assets shall be applied to the payment of the same pro rata to the amount of each said preferred claims.

L. 1877, c. 466, as added to by
L. 1884, c. 328,
L. 1886, c. 283,
L. 1887, c. 503.

Statute results from long prejudice.—The last act was passed June 2, 1887, and took effect June 22, 1887. It added § 30 to the Assignment Act of 1877. This act of 1887 was the logical result of the disfavor in which preferences in assignment have always been held.

See *Boardman v. Halliday*, 10 Paige, 223, 229.
North Riv. Bank v. Schumann, 63 How. Pr., 476.

Preferences tolerated merely.—The right to assign with preferences was settled in New York as early as 1818. It existed at common law in England, and in this State from its formation. It was interrupted for a time by the bankrupt law of April 4, 1800, but revived when that law was repealed.

Murray v. Riggs, 15 Johns., 571, 584 (1818).
McMenomy v. Ferrers, 3 id., 72 (1808).
Estwick v. Caillaud, 5 T. & R., 420 (1793).

Such preferences though in a measure upheld by our Court of Chancery, were always regarded by it with disfavor as being opposed to the maxim that "equity is equality."

Riggs v. Murray, 2 Johns. Ch., 565, 577 (Kent, Ch.)

The right to make such preferences has never been questioned by the Court of Appeals.

Jacobs v. Remsen, 36 N. Y., 668.

Coats v. Donnell, 94 id., 178.

Preferences less obnoxious than others.—Preferences which have been regarded with some favor are :

For money loaned :

Pratt v. Adams, 7 Paige, 615, 646.

Jacobs v. Remsen, 36 N. Y., 668.

Hendricks v. Robinson, 2 Johns. Ch., 283.

Estes v. Gunter, 122 U. S., 450.

In favor of accommodation acceptors.

Coats v. Donnell, 94 N. Y., 168.

In favor of sureties entitled to indemnity even for future responsibilities.

Cunningham v. Freeborn, 11 Wend., 241, 250.

Estes v. Gunter, 122 U. S., 450.

In favor of indorsers or guarantors for claims they may pay or become liable to pay by reason of responsibilities already incurred.

Brainerd v. Dunning, 30 N. Y., 211.

No preference of future claims.—But claims afterwards to be created cannot be preferred in favor of sureties or others.

Sheldon v. Dodge, 4 Den., 217.

Conditional preferences.—A preference may be conditional upon the preferred claim being sustained.

Grant v. Chapman, 38 N. Y., 293.

But not conditional upon creditors' releasing the debtor.

Grover v. Wakeman, 11 Wend., 187, 201.

Or upon their giving him future control of the assigned property.

Haydock v. Coope, 53 N. Y., 68.

Compare *Spaulding v. Strong*, 38 id., 9.

Preferences by surviving partner.—Where a surviving partner makes an assignment of the firm property in good faith, he may create preferences among firm creditors.

Williams v. Whedon, 39 Hun, 98; aff'd 109 N. Y., 333.

Loeschigk v. Hatfield, 51 N. Y., 660.

Corporations may give preferences.—Corporations have the same right to create preferences among their creditors as individuals, if not restrained by their charter or by statute.

Coats v. Donnell, 94 N. Y., 168.

Preferences by insolvent corporations are prohibited by the Revised Statutes.

1 R. S., 593, § 9.

People v. Baus, Daily Reg., Oct. 9, 1888.

This prohibition does not apply to corporations of other States.

Coats v. Donnell, *supra*.

Preferences by limited partnerships.—Preferences made by such partnerships in contemplation of their insolvency, or the insolvency of any partner, are void.

1 R. S., 767, § 21.

See § 1892

Wife may be preferred.—Since the Married Woman's Acts, the creditor's wife has the same right to be preferred as other creditors.

McCartney v. Welch, 51 N. Y., 626.

Woodworth v. Sweet, 44 Barb., 268.

Dormant partner cannot be.—A preference of a dormant partner is void as to creditors.

Clafin v. Hirsch, 19 W. Dig., 248.

Preferences bar discharge under the Code.—An insolvent debtor cannot obtain discharge from his debts, in proceedings under the Code, if he has preferred creditors within two years before his petition.

Code Civ. Pro., § 2173.

Preferences in other States.—Preferences have not been prohibited by statute in Maryland, Virginia, North Carolina, South Carolina, Florida, Mississippi, Georgia, Indiana, Wisconsin, Arkansas, and New Mexico.

Burrill, Assignments, 5th Ed., 225.

In most of the other States preferences are either deemed fraudulent and void, or are declared to inure to the benefit of all the creditors in proportion to their respective demands.

Id., 220, 224.

Chapter V.

Rules of the Court of Common Pleas, relating to General Assignments.

Authority for these Rules.

These Rules are improperly cited.

Rule 1. Duties of the clerk.

2. Filing of papers.

3. Taking papers from files.

4. Indorsement of papers.

5. Copies of papers.

6. Process, how issued.

7. Appearances.

8. Schedules, contents of.

9. Signing of Schedules.

10. Assignee's affidavit on filing.

11. Affidavit of name etc.

12. Recapitulation in Schedules.

13. Contingent Liabilities.

14. Amendment of Schedules.

15. Form of Bond.

Requirements for approval of.

16. Justification of sureties.

17. Qualifications of sureties

18. Provisional bond.

19. Assignee's Books.

20. Assignee's sales at auction.

21. Assignee's notice to creditors.

22. Accounts on Citation.

23. Reference of Accounts.

24. Substituted Assignee.

25. Form of Assignee's Account.

26. Statement of Expenses. Vouchers.

27. Proceedings on Accounting.

28. Testimony to be filed.

29. Report of Referee.

30. Mailing of notice to present claims.

Supreme Court rule as to mailing.

Authority for these Rules.—These rules were made by the Court of Common Pleas under the authority of section 7 of chapter 318 of the Laws of 1878, and they went into effect January 1, 1879.

These Rules have been improperly cited.—In Rule 23, *post*, there is a reference to sections 4 and 20 of the General Assignment Act of 1877, in such a manner as to

show that the rule was intended to apply to the same *general* assignments as the act provided for. This remark would be unnecessary if the rules had not sometimes been improperly cited, as relating to "*Insolvent Assignments*." *General* assignments should not be identified with *insolvent* assignments.

See Chap. I., p. 14, *ante*.

The insolvent laws of this State enacted, from time to time, and from very early times, to enable insolvents to obtain a discharge from their debts, were revised, and incorporated into the Revised Statutes of 1830.

2 R. S., 15.

The first section of the "*Two Thirds Act*" is as follows: "Every *insolvent* debtor may be discharged from his debts as hereinafter provided, upon executing an assignment of all his estate for the benefit of his creditors, and upon the provisions of this article being complied with."

Assignments made under this Two Thirds Act are properly styled *insolvent assignments*, and are purely statutory.

The General Assignment Acts of 1860 and 1877, and their amending acts, were not passed for the relief of insolvent debtors, and the word *insolvent* does not once occur in them. The title of the said Act of 1860 is, "An Act to secure to creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors."

The nomenclature which is peculiar to the insolvent laws ought not to be applied to any instrument, or proceeding or rule, provided for by the Assignment Acts. An assignment, provided for by the latter, is a *general* and not an *insolvent* assignment.

RULE I.

DUTIES OF THE CLERK.

The clerk, in addition to the books now kept by him, shall provide a register and docket.

In the register shall be entered in full every decree and final order made in these proceedings, according to date, and the docket shall contain a brief memorandum of each day's proceedings according to the respective titles.

The register and docket shall be, at all times during court hours, open for public inspection.

RULE 2.

FILING OF PAPERS.

Each petition, or order, or decree filed, shall be indorsed with the day and date of such filing, and the papers in each case shall be kept in a file by themselves.

RULE 3.

TAKING PAPERS FROM FILES.

No paper shall be permitted to be taken off the files of the court for any purpose, except on an order of the court.

RULE 4.

INDORSEMENT OF PAPERS.

Every paper shall have a brief memorandum indorsed on the outside cover, showing the nature thereof.

RULE 5.

COPIES OF PAPERS.

Copies of any and all papers in these proceedings shall be furnished to any person applying for the same, upon the payment of the legal fees.

RULE 6.

PROCESS, HOW ISSUED.

All process, citations, summons and subpoenas shall issue out of the court under the seal thereof, and be tested by the clerk.

RULE 7.

APPEARANCES.

Any party may appear in these proceedings, either in person or by attorney; if by attorney, the name of such attorney, with his place of business and residence, shall be indorsed on each and every paper filed by him, and his name shall be entered in the docket.

RULE 8.

SCHEDULES, CONTENTS OF.

The schedule of liabilities and assets required to be filed by the assignor or assignee shall fully and fairly state the nominal and actual value of the assets, and the cause for the difference, and a separate affidavit will be required which shall fully explain the cause of such difference. If required, the affidavits of disinterested experts, as to such value, must be furnished.

RULE 9.

SIGNING OF SCHEDULES.

Where there may be more than one sheet of paper necessary to contain the schedules, each page shall be signed by the person or persons verifying the same. The sheets of paper on which the schedules are written shall be securely fastened before the filing thereof, and shall be indorsed with the full name of the assignor and assignee, and when filed by an attorney, shall also be indorsed with his name and business address.

RULE 10.

ASSIGNEE'S AFFIDAVIT OF FILING.

Should the schedules be filed by the assignee, there must be a full affidavit made by such assignee and some

disinterested expert, showing the nature and value of the property assigned.

RULE 11.

NAME AND RESIDENCE.

The name, residence, occupation and place of business of the assignor, and name and place of residence of the assignee, may be incorporated in the affidavit or annexed to the schedules.

RULE 12.

RECAPITULATION IN SCHEDULES.

There shall be a recapitulation at the end of the schedules, as follows :

Debts and liabilities amount to \$; Assets nominally worth \$; Assets actually worth \$

RULE 13.

CONTINGENT LIABILITIES.

Contingent liabilities shall appear on a separate sheet of paper.

RULE 14.

AMENDMENT OF SCHEDULES.

Application to amend the schedules shall be made by verified petition, in which the amendments sought to be made shall appear in full, and such amendments shall be verified in the same manner as the original schedules were verified.

RULE 15.

FORM OF BOND.

The bond shall be joint and several in form, and must comply with the requirements of section 812 of the Code of Civil Procedure.

Requirements for approval of.—Every bond required to be given by an assignee under the act of April 13, 1860, respecting voluntary assignments for the benefit of creditors, must specify the place of residence of each surety named therein at the time of presenting it for approval; it must be accompanied by an affidavit showing the nominal value, and also the actual value of the property assigned; and no bond will hereafter be approved until these requirements are complied with. No bond will be approved until the schedules of assets and liabilities shall have been filed, unless satisfactory proof by affidavit, be produced, showing the reason of not filing the same.

Gen. Rule 27, Com. Pleas.

Hun's Rules, 1888, p. 378.

RULE 16.

JUSTIFICATION OF SURETIES.

The court may in its discretion require any surety to appear and justify.

RULE 17.

QUALIFICATIONS OF SURETIES.

At least one of such sureties shall be a freeholder. If the penalty of the bond be twenty thousand dollars

or over, it may be executed by two sureties justifying each in that sum, or by more than two sureties the amount of whose justification united is double the penalty of the bond.

RULE 18.

PROVISIONAL BOND.

The affidavit on which application is made for leave to file a provisional bond, must show fully and fairly the nature and extent of the property assigned, and good and sufficient reason must be shown why the schedules cannot be filed, and it must appear satisfactorily to the court that a necessity exists for the filing of such provisional bond, and for the purposes of this act the affidavit so filed shall be deemed a schedule of the assigned property until such time as the regular schedules shall be filed.

Upon the filing of the schedules the amount of the bond will be determined finally, and should the provisional bond already filed be deemed sufficient, an order will be granted making such bond as approved the final bond.

RULE 19.

ASSIGNEE'S BOOKS.

Every assignee shall keep full, exact and regular books of accounts of all receipts, payments and expenditures of money by him, which said books shall always, during business hours, be open to the inspection of any person interested in the trust estate.

[A refusal of the assignee to allow inspection of his books may be a ground for his removal.

Matter of Mayer, 10 Daly, 143.]

RULE 20.

ASSIGNEE'S SALES AT AUCTION.

In making sales at auction of personal property the assignee shall give at least ten days' notice of the time and place of the sale, and of the articles to be sold, by advertisement in one or more newspapers, and he shall give notice of the sale at auction of any real estate at least twenty days before such sale. Upon such sales the assignee shall sell by printed catalogue in parcels, and shall file a copy of such catalogue, with the prices obtained for the goods sold, with his final account.

RULE 21.

ASSIGNEE'S NOTICE TO CREDITORS.

When any notice is served on the creditors of the insolvent, pursuant to the provisions of this statute, or these rules, by mail, every envelope containing such notice shall have upon it a direction to the postmaster at the place to which it is sent to return the same to the sender within ten days unless called for. Upon every application made to the court upon such service an affidavit shall be presented, showing whether any such notices have been returned.

RULE 22.

ACCOUNTS ON CITATION.

Upon application made for a general citation, the assignee shall file with his petition his account with the vouchers.

RULE 23.

REFERENCE OF ACCOUNTS.

The assignee must file an account in all cases, which shall be referred for examination. On application for leave to compromise a claim due the estate, notice to the creditors may be ordered and case sent to referee.

DISCHARGE.

No discharge shall be granted an assignee who has not advertised for claims pursuant to section 4 of the statute and the thirtieth rule.

No discharge can be granted an assignee and his sureties in any case, whether the creditors have been paid or have released or have entered into composition or not, except in a regular proceeding for an accounting, under section 20 of the act, commenced by petition for citation, thereon to all persons interested in the estate.

RULE 24.

SUBSTITUTED ASSIGNEE.

Whenever an assignee shall have been removed, either on his own petition or on the petition of any person in-

terested in the estate, and another person appointed as assignee in his place and stead, a certified copy of the order made on such petition shall be filed and recorded in the clerk's office of the county wherein the original assignment was recorded, and the clerk of the county shall make such suitable entry on the margin of the record of the original assignment as will show the appointment of such substituted assignee, and the certified copy of the order shall be attached to the original assignment.

RULE 25.

FORM OF ASSIGNEE'S ACCOUNT.

The account of the assignee shall be in the nature of a debit and credit statement; he shall debit himself with the assets as shown in the schedules as filed, and credit himself with any decrease as well as expenses.

RULE 26.

STATEMENT OF EXPENSES. VOUCHERS.

The statement of expenditures shall be full and complete, and the vouchers for all payments other than trivial expenses shall be attached to the account.

RULE 27.

PROCEEDINGS ON ACCOUNTING.

The affirmative on the accounting shall be with the assignee, and objections to the account may be pre-

sented to the referee in writing, or be brought out on a cross-examination.

And in the latter case they must be specifically taken and entered on the minutes.

RULE 28.

TESTIMONY TO BE FILED.

The testimony taken shall be signed by the several witnesses, and attached to and filed with the report of the referee.

RULE 29.

REPORT OF REFEREE.

The report of the referee shall show all the jurisdictional facts necessary to confer power on the court, such as the proper execution and acknowledging of the assignment, the recording of the same, the filing of the schedules and bond, the advertising for creditors, the issuing of the citation, the printing of the account, and where any items may be disallowed in the account of the assignee, the same shall be fully set out in the report.

[It is supererogatory for the referee, of his own motion, to inquire into the items of the assignee's account, and the court will not, even where suspicious items are discovered, withhold its allowance of the account, nor allow fees to the referee for his unnecessary labor.

Matter of May, 13 Daly, 24.]

RULE 30.

NOTICE TO PRESENT CLAIMS.

A copy of the notice or advertisement requiring creditors to present their claims must be mailed to each creditor whose name appears in the books of the assignor, with the postage thereon prepaid, at least thirty days before the day specified in such advertisement, and proof of such mailing must be required on application for a final decree, unless personal service thereof, is made upon such creditors.

Supreme Court rule as to mailing.—The following Supreme Court rule is in force in New York County:

In all actions or proceedings in which the accounts of an assignee are settled or passed upon, a notice or a copy of the advertisement requiring creditors to present their claims to the referee must be mailed to each creditor whose name appears on the books of the assignor, with the postage thereon prepaid, at least twenty days before the day specified in such advertisement or notice for presenting claims, and proof of such mailing must be required on the application for a final decree, unless proof is furnished that personal service thereof has been made upon such creditors.

Hun's Rules, 1888, p. 333.

Chapter VI.

Forms.

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|---|--|
| I. Assignment by individual. | XV. Order of reference of disputed claim. |
| II. Assignment by Partnership and individual partners. | XVI. Petition for removal of assignee. |
| III. Acknowledgment where partner has absconded. | XVII. Orders to show cause why assignee should not be removed. |
| IV. Inventory. | XVIII. Final order of removal. |
| V. Schedule. | XIX. Petition for citation by assignee. |
| VI. Affidavit of debtor. | XX. Petition for citation by creditor. |
| VII. Order for extension of time to file inventory. | XXI. Order for citation. |
| VIII. Bond of assignee. | XXII. Citation for accounting. |
| IX. Assignee's petition for leave to file provisional bond. | XXIII. Account of assignee. |
| X. Order for leave to file provisional bond. | XXIV. Account of assignee after a composition. |
| XI. Petition for leave to advertise for claims. | XXV. Composition with creditors. |
| XII. Order for advertisement for claims. | XXVI. General release by creditors. |
| XIII. Order for examination of assignor. | XXVII. Order of reference. |
| XIV. Proof of debt. | XXVIII. Referee's report. |
| | XXIX. Decree on referee's report. |

The instruments, petitions, citations, etc., required in assignment proceedings must be made to conform to the provisions of the General Assignment act contained in Chapter IV., and to the Assignment court-rules contained in Chapter V.

It is required by the amending act of 1888, that the
(146)

assignment "specifically state therein, the residence and the kind of business carried on by such debtor at the time of making the assignment, and the place at which such business shall then be conducted, and if such place be in a city, the street and number thereof, and if in a village or town such apt designation as shall reasonably identify such debtor."

L. 1888, c. 294.

Whenever, in any assignment proceeding, the description of the debtor is a fact of jurisdiction, it should be made to comply with the above requirement.

If any of the creditors are unknown or non-resident, or reside out of the State, the petition for leave to advertise for claims, or for a citation, must fully set forth all such facts as to residence.

See Assignment Act, §§ 4, 15.

If more than twenty-five creditors prove their claims, the petition for citation must show that fact.

Id. § 13.

The Report of the Referee on accounting must show all the jurisdictional facts, as required by the Assignment court-rules.

Ass. Rule 29, Com. Pleas.

I. ASSIGNMENT BY INDIVIDUAL.

This Indenture, made this day of in
the year one thousand eight hundred and Be-
tween of party of the first part,

[State debtor's residence, and kind of business, and street and number where carried on, or, if in village or town, such apt designation as will identify the debtor, as required by L. 1888, c. 294.]

and party of the second part, *Witnesseth*, That whereas the party of the first part is indebted to divers persons in sundry sums of money, which he is unable to pay in full, (a) and is desirous of providing for the payment of the same, so far as is in his power, by an assignment of all his property for that purpose:

Now, therefore, the said party of the first part, in consideration of the premises, and of the sum of one dollar to paid by the party of the second part, upon the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over, unto the party of the second part his successors and assigns, all and singular the lands, tenements, hereditaments, appurtenances, goods, chattels, stock, promissory notes, claims, demands, property and effects of every description (b) belonging to the party of the first part, wherever the same may be, except such property as is exempt by law from levy and sale under an execution. To have and to hold the same, and every part thereof, unto the said party of the second part, his successors and assigns: (c)

In trust, nevertheless, to take possession of the same, and to sell the same with all reasonable dispatch, and to convert the same into money, and also to collect all such

debts and demands hereby assigned as may be collectible, and with and out of the proceeds of such sales and collections, to pay first and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, together with the lawful commission of the part of the second part for services in executing said trust; then to pay the wages or salaries actually owing to the employees of the assignor at the time of the execution of the assignment, in full; (d) and should the assets of the assignor not be sufficient to pay in full all these claims, said assets shall be applied to the payment of the same pro rata to the amount of each of such claims.

[Preferences so far as permitted by L. 1887, c. 503, may be thus expressed]:

And then out of the residue of the said assets to pay in full the following debts, with interest, due or to become due by the part of the first part:

1. To A. B. of the sum of for (state cause and date of contracting)

2. To C. D. of the sum of for (state cause and date of contracting)

and if the share of said assets allowed by law to be appropriated to preferred claims shall be insufficient to pay in full the said last mentioned debts, then the said share of said assets shall be applied to the same *pro rata*.

And then to pay and discharge in full, if the residue of said proceeds is sufficient for that purpose, all the debts and liabilities now due or to grow due from the said party of the first part, with all interest moneys due or to grow due thereon; and if the residue of said pro-

ceeds shall not be sufficient to pay the said debts and liabilities and interest moneys in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratably and in proportion.

And if, after the payment of all the said debts and liabilities in full, there shall be any remainder or residue of said property or proceeds, to repay and return the same to the said part of the first part, executors, administrators or assigns.

And, in furtherance of the premises, the said part of the first part do hereby make, constitute and appoint the said part of the second part true and lawful attorney irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons, all property, debts and demands due, owing and belonging to the said part of the first part, and to give acquittances and discharges for the same ; to sue, prosecute, defend and implead for the same ; and execute, acknowledge and deliver all necessary deeds, instruments and conveyances. And the said part of the first part hereby authorize the said part of the second part to sign the name of the said part of the first part to any check, draft, promissory note or other instrument in writing which is payable to the order of the said part of the first part, or to sign the name of the part of the first part to any instrument in writing, whenever it shall be necessary so to do, to carry into effect the object, design and purpose of this trust.

The said part of the second part hereby accepts the trust created and reposed in by this instrument, and

covenants and agrees to and with the said party of the first part that will faithfully and without delay execute the said trust, according to the best of skill, knowledge and ability.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

Assignor's name, [L. S.]

Assignee's name, [L. S.]

[Acknowledgment.]

Notes.

(a) This statement that the assignor is "unable to pay in full" is a declaration of his insolvency: *Cunningham v. Norton*, 125 U. S., 77.

(b) This general description is sufficient to convey all the property of the debtor: *Cunningham v. Norton*, 125 U. S., 78.

(c) An assignment is not void on its face because made to the assignee, "his heirs, executors, administrators and assigns," or to him, "his successors and assigns," because such words are descriptive of the estate conveyed, and not of the persons to whom: *Flagler v. Schoeffel*, 40 Hun, 178; *Hess v. Blakeslee*, 2 N. Y. St. Rep., 300.

(d) It is not essential that this preference of employees should be expressed in the assignment: *Richardson v. Thurber*, 104 N. Y., 606.

II. ASSIGNMENT BY PARTNERSHIP AND INDIVIDUAL PARTNERS.

This Indenture made the day of 1888 between A. and B. doing business as grocers at No. Broadway in the city of New York under the name and firm of A. & B. and A. and B. of the said city, individually parties of the first part; and C. of the same place party of the second part.

Whereas the said parties of the first part are indebted to various persons in divers sums of money which they are unable to pay in full, and desire to assign all of their property for the benefit of their creditors

Now therefore [proceed with the granting clause as in preceding form].

[Then add] And also all and singular of the separate and individual property of the individual parties of the first part both real and personal of every name and description not exempt by law from execution.(e)

In trust, nevertheless, [proceed as in the preceding form].

[If there are preferences, provide for them as in the preceding form].

[Then insert the following clause:]

And then out of the residue of the individual assets of the said parties of the first part to pay their individual debts respectively in full, but if the said individual assets be insufficient to pay the said individual debts in full, to pay the same *pro rata*.

And then after payment of the said individual debts to apply the residue of the said individual assets to the payment of the said partnership debts.

And out of the residue of the partnership assets to pay

in full the partnership debts, and if the same shall be insufficient for such payment in full, to pay such debts *pro rata*.

And then after payment of all the partnership debts to apply the residue, if any, of the partnership assets to the individual debts of the parties of the first part in such manner, that the share of such residue belonging to each of the respective parties, shall be applied to the payment of his debts, and not to the debts of the others. (f)

And if, after the payment of all the said debts and liabilities in full there shall be any remainder or residue of said property or proceeds, to return the same to the said parties of the first part, their executors, administrators or assigns according to their respective rights and interests.

And, in furtherance of the premises [proceed as in the preceding form to the end thereof].

Signatures, [L. s.]

[Acknowledgment.]

Notes.

(e) The assignment of firm property does not, of itself, operate as an assignment of individual property: *Morrison v. Atwell*, 9 Bosw., 503; *Bell v. Holford*, 1 Duer, 58; See *First Nat. Bank v. Halstead*, 20 Abb. N. C., 155.

(f) A clause directing the application of the surplus, after payment of partnership debts, to payment of the individual debts is not essential, but if any direction of the kind be given, care must be taken not to apply the share of the surplus belonging to one partner to the debts of another partner: See *Crook v. Rindskopf*, 105 N. Y., 476; *Turner v. Jaycox*, 40 id., 470.

III. ACKNOWLEDGMENT WHERE PARTNER HAS AB-
SCONDED. (a)

State of New York {
City and County of New York } ss:

On this third day of February 1881 before me personally appeared J. D. to me known, and known to me to be one of the firm of S. & D. and the individual described in and who executed the foregoing instrument, and acknowledged to me that he executed the same; and the said J. D. having been duly sworn did depose and say that his co-partner, the said J. A. S. has left his usual place of business, and has not been seen or heard from by him, said J. D. since Friday, the 28th day of January 1881; and that on Saturday the 29th day of January 1881, he the said J. D. was informed by one B., a note broker, that the said J. A. S. was charged with having forged commercial paper; and further that said J. A. S. cannot be found within this State and has absconded therefrom; and further that the said firm of S. & D. is composed of the said J. A. S. and the said J. D. only.

[L. S.]

MELVIN BROWN,
Notary Public,
Kings Co.

Certificate filed in N. Y. Co.

(a) This form is to be found in the record of *Bagley v. Bowe*, 105 N. Y., 171. See Cases in the Court of Appeals, Vol. 817.

IV. INVENTORY.

In the matter of the assignment
 of
 to
 for the benefit of creditors. }

A full and true Inventory of all the Estate of
 on the day of the date of the assign-
 ment of said both real and personal in law
 and in equity and the incumbrances existing thereon,
 and of all vouchers and securities relating thereto, and
 the value of such estate according to the best knowl-
 edge of said.....

ASSETS.	NOMINAL VALUE.		ACTUAL VALUE.		CAUSE OF DIFFERENCE.

[See Ass. Rules 8, 9, Com. Pleas, as to the form and signing of the Inventory and Schedules. P 137 *ante*.]

VI. AFFIDAVIT OF DEBTOR.

In the matter of the assignment
 of
 to
 for the benefit of creditors. }

County of New York, ss.

A. B. being sworn, says that he is the assignor named in the above assignment which bears date the day of 18 recorded in the office of the clerk of the county of the day of 18 . Also that the inventory and schedules hereto annexed contain a full and true account of all the creditors of said deponent, the place of residence of each creditor, where the same is known to deponent and where the same is not known, the fact is so stated therein ; also the sum owing to each creditor and the nature of each debt or demand, whether arising on written security, account or otherwise ; also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness arose ; also a statement of any existing judgment, mortgage, collateral or other security for the payment of any such debts ; also a full and true inventory of all the estate both real and personal, in law and equity of said assignor at the date of said assignment, and the incumbrances existing therein, and of all vouchers and securities relating thereto, and the value of such estate according to the best knowledge of deponent, and deponent further says that the annexed inventory and schedules are in all respects just and true according to exponent's best knowledge and belief.

Sworn to before me this day of 1888.

[The name, residence, occupation and place of busi-

ness of the assignor, and name and place of residence of the assignee may be incorporated in the affidavit or annexed to the schedules.

Ass. Rule 11, Com. Pleas.]

VII. ORDER FOR EXTENSION OF TIME TO FILE INVENTORY.

Title of Court.

In the matter of the assignment
of
to
for benefit of creditors. }

Upon the affidavit of the assignee above named that the said assignor has not filed the inventory and schedules in the said matter within the time prescribed by law, and that the said assignee is not able to file them within the time prescribed by law; Now on motion of attorney for the assignee,

It is ordered that the assignee be and he is hereby allowed twenty days from this day of within which to file the said inventory and schedules.

-----, Judge.

VIII. BOND OF ASSIGNEE.

Know all Men by these Presents, That We,
residing at No. in the and residing at
No. in the and residing at No.
in the are held and firmly bound unto the
People of the State of New York, in the sum of
dollars, lawful money of the United States
of America, to be paid to the said People; to which
payment well and truly to be made we bind ourselves

our and each of our heirs, executors and administrators jointly and severally, firmly by these presents. Sealed with our seals.

Dated the day of one thousand eight hundred and

Whereas *ha* made an assignment of property, in trust to the above bounden for the benefit of creditors, dated the day of one thousand eight hundred and
Recorded on the day of 18 in the office of the Clerk of the County of

Now, therefore, the Condition of this Obligation is such, that if the above bounden shall faithfully execute and discharge the duties of such assignee, and duly account for all moneys received by him as such assignee, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in {
the presence of }

----- [L. S.]
----- [L. S.]
----- [L. S.]

County of ss

one of the sureties to the foregoing Bond being duly sworn, says, that he is a resident and *holder* within this State, and is worth the sum of dollars, over all his debts and liabilities, and exclusive of property exempt by law from execution.

Sworn to before me, this *day* {
of 18 }

County of ss.

one of the sureties to the foregoing Bond

being duly sworn, says, that he is a resident and
holder within this State, and is worth the sum
 of dollars, over all his debts and lia-
 bilities, and exclusive of property exempt by law from
 execution.

Sworn to before me, this day
of 18 }

Notary Public.

-----ss.

I Certify, that on this day of 18
 before me personally appeared the within named
 known to me to be the individuals described
 in and who executed the within bond, and severally
 acknowledged that they executed the same.

Notary Public.

I hereby approve of the within Bond and of the
 sufficiency of the sureties therein.

-----Judge.

IX. ASSIGNEE'S PETITION FOR LEAVE TO FILE PRO- VISIONAL BOND.

In the matter of the assignment }
 of }
 to }
 for the benefit of creditors. }

To the Hon. of the Court of Common Pleas :

The petition of respectfully shows that he is the
 assignee of the said assignor above named by virtue
 of his assignment duly acknowledged and filed in the
 office of the clerk of the city and county of New York
 on the day of 18

That more than twenty days have elapsed since the

recording of said assignment in the said clerk's office and that the said assignor has not filed his inventory and schedule therein as required by law.

That the reasons why the said schedule has not been filed are as follows :

[State fully the reasons.]

That your petitioner is desirous of complying with the terms of the trust created by said assignment and with the statute relating thereto by filing his bond.

That your petitioner has examined the books of the said assignor and from such examination it appears that his debts and liabilities amount to dollars.

That your petitioner has taken an account of the property of the said assignor, and has also obtained the affidavits of experts as to its value, which affidavits are hereunto annexed, from which it appears that the actual value of the said property is dollars.

That the outstanding amounts due to the said assignor, as appears from his said books, aggregate the nominal sum of dollars, but that the actual value thereof is only about the sum of dollars.

That the cause for this difference between the actual and nominal value of said claims is as follows :

[State the nature of the debts deemed bad, and whether they are so by reason of their long-standing, or of the insolvency of the debtors].

That as appears from the said examination and affidavits, the actual amount of assets which will come into the hands of your petitioner will be about the sum of dollars.

Wherefore your petitioner respectfully prays that he may be permitted to file a provisional bond for the

faithful discharge of his duties as assignee as provided by the statute in such case made and provided.

-----, Assignee.

(Verification.)

See Ass. Rule 18, Com Pleas. Page 140 *ante*.

X. ORDER FOR LEAVE TO FILE PROVISIONAL BOND.

Title of Court.

In the matter of the assignment
of
to
for the benefit of creditors. }

On reading and filing the verified petition of the assignee above named and the affidavits of the experts as to the actual value of the assigned property; Now on motion of attorney of the petitioner,

It is ordered that the said petition be granted, and that the said assignee have leave to file a provisional bond for the faithful performance of his duties as such assignee and for his due accounting in the matter of the said assignment in the penal sum of with good and sufficient sureties, and upon the filing and approval of such bond the said assignee shall be vested with full powers to execute the trust created by said assignment. It is further ordered that upon the filing of the schedules hereafter, the said bond which is hereby ordered provisionally may be increased as may hereafter be deemed proper and necessary.

-----, Judge.

XI. PETITION FOR LEAVE TO ADVERTISE FOR CLAIMS.

In the matter of the Assignment }
 of }
 to }
 for the benefit of creditors. }

To the Court of Common Pleas

For the City and County of New York:

The petition of the above named assignee respectfully shows,

That on the day of the assignor above named duly executed and acknowledged his assignment to your petitioner which was filed in the office of the clerk of the county of , in which the assignor resided and carried on business on the day of

That the said assignor filed an inventory and schedules on the day of as required by law. That on the day of your petitioner gave his bond, with good and sufficient sureties, which was duly approved and filed, as required by law, and your petitioner has entered upon the duties of his trust.

That from an examination of the books of said assignor your petitioner believes that some of the assignor's creditors reside outside of this State, to wit, in , and cannot be personally served with notice to present their claims to your petitioner.

Therefore your petitioner prays that an order may be entered authorizing your petitioner to advertise for all persons interested in the said estate to present to him their claims with the vouchers therefor duly verified, on or before a day certain to be named therein.

(Verification.) -----, Assignee.

XII. ORDER FOR ADVERTISEMENT FOR CLAIMS.

In the matter of the assignment }
 of }
 to }

On reading and filing the annexed petition of the above named assignee, verified on the day of 1888, and on motion of , his attorney,

It is ordered, that the said petition be granted, and the said assignee is hereby authorized to advertise for the creditors of the said assignor to present to him their claims, with the vouchers therefor, duly verified on or before a day to be specified in such advertisement, not less than thirty days from the last publication thereof, which advertisement shall be published once in each week for six successive weeks in the and newspapers published in the City and County of New York.

....., Judge.

[Since the passing of L. 1884, c. 133, the advertisement is not required to be published in the State paper, where creditors reside out of the State.

The advertisement must be mailed to creditors as required by Ass. Rule 30, p.145, *ante*.]

FORM OF ADVERTISEMENT.

In pursuance of an order made by the Hon. , and one of the judges of , on the day of , notice is hereby given to all the creditors and persons having claims against , lately doing business in the City and County of New York, to present their said claims with the vouchers therefor, duly verified, to the subscriber, the duly appointed assignee of the

said , for the benefit of creditors, at his place
of business, No. street, in the City of New
York, on or before the day of , 18—.

-----, Assignee.

XIII. ORDER FOR EXAMINATION OF ASSIGNOR.

In the matter of the assignment }
of }
to }

On reading and filing the petition of the assignee
above named, and on motion of , his attorney,

It is ordered, that the assignor above named be and
appear before , Esq., the referee hereby appointed,
at his office at , in the City of New York, on the
 day of , at o'clock in the noon, then
and there to be examined in the matter of the said as-
signment, and to give under oath all the information he
may possess in relation to the assigned property and
the creditors of the said assignor, and all other matters
that may further the execution of the trust created by
the said assignment.

-----, Judge.

THE SAME; ANOTHER FORM.

[Upon petition of a creditor.] (*a.*)

Court of Common Pleas,
For the City and County of New York.

In the matter of the assignment }
of }
to }
for the benefit of creditors. }

Upon the verified petition of , creditor of the

assignor above named, of date the day of , 1883; and hereunto annexed, and upon all the papers and exhibits annexed to said petition.

And on motion of , the petitioners' attorneys, It is ordered, that the said petitioners be, and they are hereby, granted leave to examine the persons hereinafter named, and the books and papers hereinafter referred to, before Esq., counselor at law, who is hereby appointed sole referee for that purpose.

And it is further ordered, that said petitioner have leave to examine the said assignors and the said assignee , and such other witnesses as may be ordered by the court to appear before the said referee, and that upon service of a copy of this order, and a notice of summons of five days, from said referee, any or all of said persons shall be required to appear at such time and place as he shall name in the said notice or summons, and bring with them and produce before said referee all books which at the time of the assignment, or within one year prior thereto, were kept by said assignors, either in the City of New York or elsewhere, and which contain entries relating to the business or the property of said assignors; and also all books and papers kept by the said assignee in the course of his duty as such, containing entries or memoranda relating to the assigned estate and his execution of the trust; and that said persons, said assignors and said assignee, and every of them, appear before the said referee at such times and places as he by his summons shall prescribe, and there submit to examination as to whether they have, one and all, turned over to said assignee all and singular the property belonging to said

assignors, and by said assignment conveyed; and whether the said assignee has been endeavoring to execute his trust in the interest of all persons interested in the assigned estate, or solely in the interest of the assignors, and in disregard of the interests of the general creditors; and obey all orders which may be made by said referee in respect to their attendance, their examination, and the production and disposition of the said books and papers.

GEORGE M. VAN HOESEN,
Judge N. Y. Com. Pleas.

(a) Matter of Holbrook, Cases in the Court of Appeals, Vol. 733.

For an example of a defective order see 99 N. Y., 541, and the record as above cited.

The foregoing order is provided for by § 21 of the act of 1877.

The testimony taken by the referee is to be filed in the clerk's office, without finding or opinion by the referee.

Matter of Ives, Daily Reg. Sept. 14, 1887.

XIV. PROOF OF DEBT.

City and County of New York, ss.

I, _____, being duly sworn, do depose and say, that the annexed account of _____, lately doing business in the City of New York as a grocer, at No. 100 Broadway, is just and correct, and that there is now due by the said _____ to this deponent the sum of _____ dollars; and that there are no set-offs or counterclaims thereto, to the knowledge or belief of this deponent.

Sworn to before me,
this _____ day of _____.

XV. ORDER OF REFERENCE OF DISPUTED CLAIMS.

Court of Common Pleas,
For the City and County of New York.

In the matter of the assignment }
of }
to }
for the benefit of creditors. }

Upon reading and filing the verified petition of _____, the above named assignee, of date the _____ day of _____, from which it appears that _____ has presented a claim against the said assigned estate for the sum of _____, which claim is disputed by the said assignee,

Now, on motion of the petitioner's attorney,

It is ordered, that the said disputed claim be, and the same is hereby, referred to _____, as referee to hear and determine the same.

_____, Judge.

XVI. PETITION FOR REMOVAL OF ASSIGNEE.

[See page 78 *ante.*]

In the matter of the assignment }
 of }
 to }
 for the benefit of creditors. }

To the County Court of County:

The petition of of in the county of
 respectfully shows :

That your petitioner is a creditor of the assignor above
 named, having an account against him at the time of
 the assignment amounting to dollars (state the
 nature of the account).

That the said assignment bears date the day of
 1888, and was recorded in the county clerk office's
 of county on the day of .

That no inventory and schedule, have been made and
 filed by the said assignor, or by said assignee, as re-
 quired by law, although more than thirty days have
 expired since the date of said assignment, nor has any
 order been entered extending the time for the filing of
 the same by said assignee [or state other facts showing
 misconduct or incompetency on the part of the as-
 signée].

Therefore your petitioner respectfully prays that the
 Honorable the county judge of county will
 order the said assignee forthwith to appear before him
 and show cause why he should not be removed.

(Verification.)

XVII. ORDER TO SHOW CAUSE WHY ASSIGNEE SHOULD
NOT BE REMOVED.

At a Special Term, etc.

Title of proceeding. }

Upon reading and filing the petition of of
date and on motion of attorney of the petitioner,
It is ordered that the said assignee appear before me at
 on the day of at o'clock in the forenoon
and show cause why he should not be removed from his
office of said assignee.

It is further ordered that copies of this order and of
said petition be served upon said personally on or
before the day of 1888.

[Date.]

-----, County Judge.

ANOTHER FORM OF SAME ORDER.

Title of proceeding. }

On reading and filing the petition of a creditor of
the above named assignor, duly verified, and bearing
date the day of and the papers thereto annexed,
It is ordered that the said show cause before me,
one of the judges of the said court at a Special Term
thereof, to be held in the chambers thereof, on the
day of at ten o'clock in the forenoon, or as soon
thereafter as counsel can be heard, why an order should
not be made removing him from his trust as assignee of
the said on account of his misconduct therein, and
why he should not account for his administration of

said trust, and why some suitable person should not be substituted as assignee in his stead and place, and why he should not deliver any property in his hands, belonging to said assignor, to said substituted assignee.

And until the hearing and determination of such application, let all proceedings on the part of the said in the administration of the said estate be stayed.

It is further ordered that copies of this order and of said petition and papers be served upon said personally on or before the day of 1888.

[Dated at .]

XVIII. FINAL ORDER OF REMOVAL.

At a Special Term, etc.

Title of proceeding. }

On reading and filing the verified petition of of date the day of and the order to show cause granted thereon, and on motion of petitioner's attorney,

It is ordered that the said be and he hereby is removed as assignor of the said under and by virtue of the assignment mentioned in said petition. It is further ordered, that be, and he hereby is, appointed as substituted assignee in the place and stead of the said, and upon his executing a bond to the people of the State, with good and sufficient sureties, and upon the approval and filing thereof by one of the judges of the Court of Common Pleas, the said shall be deemed fully appointed as such substituted assignee.

It is further ordered that upon proof of the approval and filing of such bond, that the said assignee pay

over, deliver and surrender to the said as substituted assignee, all the moneys, assets, property, real and personal, papers and accounts, belonging to the said estate which may be in his possession or under his control; and until such time the temporary injunction heretofore granted is continued against said assignee.

It is further ordered, that it be referred to Esq. Counselor-at-law to take and state the account of the said removed assignee, and to hear and determine all matters relating thereto, and upon the coming in of the said Referee's report, the said assignee may make such application as he deems best in the premises for the protection of himself and the sureties on his bond. It is further ordered, that for a failure on the part of the said assignee to comply with any of the provisions of the foregoing order, the said substituted assignee shall be at liberty to move for an attachment against him as and for a contempt of court.

-----Judge.

XIX. PETITION FOR CITATION BY ASSIGNEE.

[Petition by assignee may be made at any time. Petition should show how many creditors have proved their claims. Assignment Act, §§ 11, 13.]

In the matter of the ac- }
counting of }
assignee of the property }
of }

To the Court of Common Pleas, etc.

The petition of assignee above named respectfully shows:

That on the day of the above named

made a general assignment of his property to your petitioner, which was accepted by your petitioner, and recorded in the office of the clerk of the county of _____ on the _____ day of _____ 1888.

That your petitioner filed the inventory and schedules required by law, in the office of the clerk of this court, on the _____ day of _____ and has duly furnished his bond and entered upon and performed his duties as such assignee.

That pursuant to an order made by the Honorable one of the judges of this court, on the _____ day of _____, your petitioner advertised for creditors of the said assignor to present their claims to him on or before a day specified; that said notice was published pursuant to said order and copies thereof were duly mailed to all creditors whose names were on the books of said assignor as appears by the affidavits hereto annexed. That the time within which claims were to be required by said notice to be presented to your petitioner expired on the _____ day of _____; and the following creditors have presented their claims to your petitioner.

[If some creditors are unknown or out of State, it must be shown. Assignment Act, § 15.]

Your petitioner therefore prays that a citation may be issued to all persons interested in the said estate, as creditors, or otherwise, requiring them to appear in court, upon some day therein to be specified, and to show cause why the settlement of the account of your petitioner should not be had, and if no cause be shown, to attend the settlement of such account.

[Verification.]

XX. PETITION FOR CITATION BY CREDITOR.

[Petition by creditor, surety or assignor may be made after lapse of one year from date of assignment, or where assignee has been removed. Assignment Act, § 11.]

Title of proceeding. }

To the County Judge of Kings County :

The petition of respectfully shows that on the day of the above named assignor executed to your petitioner a general assignment for the benefit of his creditors which was duly accepted and filed in the office of the clerk of Kings County on the day of .

That your petitioner is a creditor of the said assignor to the amount of (State cause of debt).

Your petitioner further shows, on information and belief, that the said assignee at or about the time of the delivery of the said assignment, entered upon the execution of the trusts and took possession of the assigned estate, amounting in value to about \$ and sold and disposed of the same (but has never filed a bond as required by law).

And your petitioner further shows on information and belief that the said assignee has never declared a dividend nor filed an account; and your petitioner's debt is still wholly unpaid; and a large number of the creditors of the assignor still remain unsettled with, and your petitioner is informed and believes that said assignee has converted to his own use the greater part of the assigned estate.

That more than one year has elapsed since the date

of the said assignment (or that the assignee has been removed).

Your petitioner therefore prays that a citation may be issued to the said assignee (continue as in the last form)

XXI. ORDER FOR CITATION.

At a Special Term of the County Court of Kings county, held at on the day of

Present, Hon. , Judge.

In the matter of the accounting. }
of }
etc., etc. }

On reading and filing the petition of
of , date the day of , 1888,
and on motion of the attorney of the
said ,

It is hereby ordered that the said petition be granted, and that a citation issue to all parties interested in the estate assigned, as creditors or otherwise, to be and appear in the said county court at the chambers of the county judge thereof, on the day of at o'clock in the forenoon, and to show cause then and there why a settlement of the account of said assignee should not be had, and if no cause be shown, to attend the settlement of the same.

And it appearing from said petition (or from the affidavit of annexed to said petition) that more than twenty-five of the creditors of the said assignor have proved their claims, It is further ordered that such citation be served on each creditor who has proved his claim, by depositing a copy of the same at least thirty

days prior to the return day thereof, in the post-office at the place where the said assignee resides, duly indorsed and directed to each of said creditors at his last known post-office address, with the postage prepaid, and by publishing the said citation once a week for at least four weeks prior to such return day in the a newspaper (or newspapers) published at .

-----, Judge.

[If creditors reside out of the State the citation is to be published for six weeks. Assignment Act, § 15.]

This advertisement of the citation is discretionary with the court.

Matter of Gilbert, 9 Daly, 479.

XXII. CITATION FOR ACCOUNTING.

The people of the State of New York to all persons interested in the estate of assigned to for the benefit of creditors:

You and each of you are hereby cited and required to appear before and in the county court of the county of to be held at the office of the Hon. , county judge in the of in the county of on the day of at o'clock then and there to show cause why a settlement of the account of the said assignee should not be had, and if no cause be shown, to attend the final settlement of such account.

In testimony whereof, I have caused the seal of the county court of to be hereto affixed.

[L. S.] Witness, Hon. county judge of
county this day of .

-----, Clerk.

[As to sealing and testing of citation, see Ass. Rule 6, Com. Pleas.]

XXIII. ACCOUNT OF ASSIGNEE.

In the matter of the assignment }
 etc., etc. }

To the Court of Common Pleas
 For the City and County of New York:

I of do respectfully render the following account of my proceedings as assignee in the above matter.

The assignment of the above named assignor duly acknowledged was filed in the office of the clerk of
 county on the day of

The inventory and schedule required by law were duly filed on the day of whereby it appeared that the debts or liabilities of the said assignor amount to \$ his nominal assets to \$ and his actual assets to \$

I do further declare that on the day of I did produce to one of the judges of this court my bond, in the penalty required, with two good and sufficient sureties, which bond was approved and filed as required by law.

That an order for the publication of a notice to the creditors of said assignor was made by , one of the judges of this court on the day of , and said notice was duly published and a copy thereof mailed to each creditor whose name appears in the assignor's books.*

Schedule A, hereto annexed, contains a statement of all the property contained in the inventory of the assigned property as aforesaid, and sold by me, with the prices and manner of sale, which sales were fairly

made by me at the best prices that could be obtained with due diligence.

It also contains a statement of all the debts due the said estate and mentioned in said inventory and schedule, which have been collected, and also of all interest moneys received by me.

Schedule B, hereto annexed, contains a statement of all debts in said inventory mentioned not collected or collectible by me, together with the reasons why the same have not been collected and are not collectible; and also a statement of the articles of personal property mentioned in said inventory unsold, and the reason of the same being unsold; and also a statement of all property mentioned therein lost by accident without any willful default or negligence, the cause of its loss and appraised value.

No other assets than those mentioned in said schedule or inventory, as herein set forth, have come to my possession or knowledge, and all increase or decrease in the value of any assets of the said assignor, has been allowed or charged in said Schedules A and B.

Schedule C, hereto annexed, contains a statement of all moneys paid by me for the necessary expenses of the said estate, together with the reasons and the object of said expenditure.

Schedule D, hereto annexed, contains a statement of all the claims of creditors presented to me in pursuance of said notice, together with the names of the claimants, the general nature of the claim, with the amount and the date thereof, and also a statement of all moneys paid by me on account of said claims with the names and the time of such payments.

Schedule E, hereto annexed, contains a statement of

all other facts affecting my administration of said assignor's estate, my rights and those of others interested therein.

I charge myself,

Amount as per inventory	\$
Increase as shown by Schedule A	\$

I credit myself,

Amount of losses as per Schedule B	\$
Amount of debts not collected, Schedule B	\$
Amount of Schedule C	\$
Amount of Schedule D	\$
Leaving a balance of	\$

To be distributed *pro rata*, subject to the deductions of the amount of my commissions and the expenses of this accounting.

The said several schedules which are signed by me are part of this account.

Dated.

-----Assignee.

City and county of New York, ss.

I assignee of being duly sworn, say, that the charges made in the foregoing account of proceedings, and schedules annexed, for moneys paid by me to creditors, and for necessary expenses, are correct; that I have been charged therein all the interest for moneys received by me and embraced in said account for which I am legally accountable; that the moneys stated in said account, as collected, were all that were collectible, according to the best of my knowledge, information and belief on the debts stated in such account at the time of the settlement thereof; that the allowances in said account for the decrease in the value of any

assets, and the charges therein for the increase in such value are correctly stated; and that I do not know of any error in said account or anything omitted therefrom which may in any wise prejudice the rights of any party interested in the estate of said assignor.

And I further say, that the sums under twenty dollars charged in the said account, for which no vouchers or other evidence of payment are produced, or for which I may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by me as charged.

Sworn to before me this {
day of , 18 . }

XXIV. ACCOUNT OF ASSIGNEE AFTER A COMPOSITION.

[Follow form XXIII. down to the * and then proceed as follows:]

I do further state that subsequent to the filing of my bond as aforesaid, and on or about the day of , 18 , all of the creditors of the above named assignor, whose names appear upon the said inventory or schedule, filed on the day of , 18 , did, by an instrument in writing, in the nature of a composition deed, agree to accept a sum equal to cents upon each and every dollar of the indebtedness of the said assignor to them, which said instrument so signed in the presence of a witness is hereto annexed and marked as Schedule A.

That thereafter, and on or about the day of , 18 , the said creditors as aforesaid, by a further instrument in writing, did release the said assignor of each and every claim that they and each of them had against him by reason of any demand whatever, which said instrument so signed and duly acknowledged by the

whatsoever, in law or equity, which against we ever had, now have, or which we, or either of our heirs, executors or administrators hereafter can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these presents.

In witness whereof, we have hereunto set our hands and seals the day of , one thousand eight hundred and

Sealed and delivered in the
presence of

XXVII. ORDER OF REFERENCE.

At a Special Term, etc.
Present, Hon. ,
Judge.

In the matter of the assignment }
of }
to }

The assignee above named appearing and filing due proof of service of a citation returnable this day, pursuant to the order of the Hon. , made in the above entitled matter, on the day of , and the following creditors of the said assignor appearing and filing their appearance with the clerk of this court:

Now, therefore, on the account of the said assignee filed in the above entitled matter on the day of , and the papers and schedules thereto annexed, and on the said citation, and proof of due service thereof, and on motion of , attorney for the said assignee,

It is ordered, that it be referred to , counselor at law, to take and state the accounts of the said

assignee in the said matter, and all matters relating thereto; and to take proof and report what persons are entitled to a distributive share of the said assigned estate, and their just proportional shares thereof; and that he so report with all convenient speed.

It is further ordered, that the said assignee give notice of hearing before said referee to all creditors who have appeared on the said citation, or who have presented claims.

-----, Judge.

[The order of reference must recite the appearances on the return day of the citation.

Matter of Wehnkel, Daily Reg., Sept. 21, 1888.]

XXVIII. REFEREE'S REPORT.

In the matter of
The final accounting of
Assignee of

}

*To the Court of Common Pleas,
For the City and County of New York:*

I, Referee appointed herein, by order dated , to take and state the accounts of the above named assignee, do respectfully report that, having taken and subscribed the oath required of a referee by section 1016 of the Code of Civil Procedure, I proceeded to take proofs, and from the evidence before me, which is hereto annexed and forms part of this report, I find the following:

I. That prior to the day of , 18 , the above named assignor was engaged in business in the city of New York and then resided in the city of New York.

II. That on said last mentioned date he executed and acknowledged an instrument in writing assigning all his property to the above named assignee in trust for the benefit of the creditors of said assignor. That the following preferences were created in and by said assignment, viz.:

III. That the said assignee joined in the execution and acknowledgment of said assignment, and accepted said trust. That said assignment was acknowledged by _____ on _____ and was recorded in the office of the clerk of the city and county of New York, on the _____ day of _____, 18 ____.

IV. That schedules of the assigned estate and of the liabilities of the assignor, duly verified by him, were filed in the office of the clerk of this Court on the _____ day of _____, 18 ____, showing the liabilities of the Assignor to be \$ _____ with \$ _____ nominal assets, and \$ _____ actual assets; and on the _____ day of _____, 18 ____, Hon. _____, one of the Judges of this Court, ordered the assignee to file a bond in the penalty of \$ _____.

V. That on the _____ day of _____, 18 ____, the said assignee presented to the Hon. _____ one of the Judges of this Court, his bond with

_____, residing at _____ residing at _____, as sureties in the penal sum of _____ which bond was, on the said last named day, approved by the said last named Judge, and was filed on said day in the office of the clerk of the Court.

VI. That the said assignee having applied to this Court upon petition, verified by him on the _____ day of _____, 18 ____, for an order to advertise for creditors to present their claims, with the vouchers duly verified,

VII. That the said advertisement was published as directed in each of said papers, commencing on the _____ day of _____, 18____, and the following is a copy of such advertisement:

IX. That the following persons have presented claims, duly verified, to the assignee, viz.:

NAME.	ADDRESS.	AMOUNT.	DUE.	FOR

X. That on the day of 18 , the said assignee presented to this Court an account of his proceedings as assignee, verified by his oath thereto, made on the day of 18 , stating his accounts as follows, viz.:

<i>Dr.</i>					
Inventory of Stock, ...	\$				
Inventory of Accounts, ...					
Increase by	\$				
<i>Cr.</i>					
Decrease, ...	\$				
Expenses, ...					
Dividends paid to					
Balance, ...	\$				

XI. That upon petition of the said assignee, verified by him on the day of , 18 , this Court, by order made by Hon. , one of the Judges thereof, directed a citation to issue to all persons interested, requiring them to appear in this Court and attend the final settlement of the accounts of said assignee. That such citation was thereupon issued out of and under the seal of this Court, returnable on the day of , 18 . That by order of this Court, duly made on the day of , 18 , the said citation was ordered to be served by publication in

XII. That said citation was duly served in the following manner upon :

XIII. That on the return of said citation the following parties and none other appeared in this Court.

XIV. That the following objections to said account were filed by the following parties.

XV. That by order made by the Hon. , on the day of , 18 , this Court referred the said account to me to take and state the same, and to take proof and report what persons are entitled to a distributive share of the said assigned estate and their just proportional shares thereof.

XVI. That I issued a summons to attend the reference before me at my office, No. _____, on the _____ day of _____ 18____, at _____ o'clock. All which notice was duly served on all of the persons who appeared on the return of the citation above referred to.

XVII. That the following named persons appeared before me on said reference in person, and the following by counsel, viz.:

XVIII. That the said assignee, immediately after the approval and filing of this bond, entered upon his duties as such assignee; that he reduced to possession the assigned estate, consisting of
that he sold

realizing therefrom

that he collected

that he paid out and expended for _____.

That he has faithfully performed the duties of his said trust as such assignee; and that he should be allowed the following expenditures as necessary in the execution of said trust, viz.:

And that his accounts should be stated, and I do hereby state them as follows, viz.:

Dr.

To Inventory of Stock, . . .	\$
" " " Accounts, . . .	
" Increase (Schedule A), . . .	
Total, . . .	\$ _____

Cr.

By Decrease of Stock, . . .	\$
Accounts, . . .	
Expenses, . . .	
Payments to . . .	
Creditors, viz.: . . .	\$ _____

XIX. That the commissions which should be allowed to the said assignee amount to \$ after deducting which there remains in his hands the sum of \$ from which are to be paid the costs of this accounting.

All which is respectfully submitted.

Dated New York,

1888.

-----, Referee.

XXIX. DECREE ON REFEREE'S REPORT.

At a Special Term, etc.

Present Hon.

Judge.

In the matter of, etc. }

Upon the order of reference to take and state the account of the assignee above named made by the Hon. on the day of and upon the report of the said referee filed on the day of with the testimony exhibits and vouchers thereto annexed, and upon the exceptions to the said report filed by [Names and attorneys of Exceptants].

And upon due proof of a service of the notice of the filing of said report, and of this application, upon all persons interested in the said estate, who have been heretofore legally notified of the proceedings herein, and who have appeared upon the said accounting, which said proofs are annexed to and form a part of the report of the referee above mentioned and now on file in this court, and after hearing , of counsel for the assignee in favor of the confirmation of said report and opposed thereto [or consenting thereto],

and after reading the said report and the exceptions thereto, and after full hearing of the said parties interested therein, and upon due consideration thereof, it is ordered, adjudged and decreed as follows:

I. That the said report of the said referee in the above entitled matter filed on the day of 18 , be and the same is hereby in all things confirmed.

II. That out of the rest and the residue of the estate of the said assignor, remaining in the hands of the said assignee, after deducting his expenses and commissions as allowed by the said referee, and after paying the expenses of the said accounting, the said assignee do make payments *pro rata* amongst those who have appeared on these proceedings and demanded the same, as follows:

To [name] [amount.]

III. That the said assignee do take good and sufficient vouchers for each and every payment so made, and, if, after reasonable diligence, any of the persons so entitled to a share in the said distribution cannot be found, then the share so belonging to such person shall be deposited in the Trust Company, to the credit of such entitled claimants.

It is further ordered, adjudged and decreed, that upon a compliance with the foregoing terms, the assignee may, upon due proof of the same being presented to the judge, to whom the application may be made, be entitled to an order relieving him of his liability as such assignee, and releasing the sureties upon his said bond of all liability that they might otherwise be under, in so far as the same may be affected by, or relate to the interest of any of the persons interested in the said estate who have been properly and legally

notified of these proceedings, and that the said application may be made without any further notice.

Judge.

XXX. PETITION FOR LEAVE TO COMPROMISE WITH ASSIGNOR'S DEBTORS. (*m*)

In the matter of etc. }

To the court etc.

The petition of _____, the assignee above named, respectfully shows :

That on the _____ day of _____ A. B., the assignor above named made an assignment of all his property for the benefit of his creditors to your petitioner, which was duly recorded on _____ day of _____ 1888.

That your petitioner accepted the said trust, gave the required bond, with sureties, which was approved and filed, and was entered upon his duties as such assignee.

That among the assets and choses in action of the said assignor which have come into the possession of your petitioner, as such assignee, is a certain promissory note payable to the said assignor made by one, E. F. (describe the note).

That upon applying to the said E. F. for payment of the said note, your petitioner was told by him that the said note was given by him to said assignor on account of certain goods bought of said assignor by sample, that the said goods turned out to be inferior to the sample, as the said E. F. had informed the said assignor, and the latter admits that said E. F. did complain to him of the inferior quality of said goods.

That your petitioner is also informed and believes

that the said E. F. is a person of small means and in embarrassed circumstances.

[State the facts.]

That the said E. F. offers to pay your petitioner fifty per centum of the principal and interest due on said note and your petitioner believes such a compromise to be for the best interests of the creditors and all others interested in the said assignment (mention any creditors who are of same opinion).

Wherefore your petitioner prays that an order of this court be granted authorizing your petitioner to accept the said compromise and to cancel and surrender the said note upon receiving from said E. F. fifty per centum of the principal and interest due thereon.

-----, Assignee.

[Verification.]

(*m*) If there is more than one assignee, they should all join in the petition. *Anon v. Gelpcke*, 5 Hun, 245.

And notice of the application should be given to schedule creditors. *Matter of Youngs*, 5 Abb. N. C., 346

XXXI. COMPLAINT IN ACTION TO SET ASIDE ASSIGNMENT AS FRAUDULENT.

Supreme Court.

J. D. K—z. C—k.	}
agst.	
L. R. and M. R. and	
Abraham Rosenthal,	
as assignee.	)

The plaintiff complaining of the defendants above named respectfully alleges and shows

1. That on and prior to the 23d day of October, 1882, the defendants L. R. and M. R. were copartners in busi-

ness in the city of New York as coal dealers under the firm name of R. & R.

2. That on the day of the plaintiff recovered a judgment against said firm of R. & R. in the Court of the city of New York for the sum of

3. That the judgment record of said judgment was on the day duly filed and said judgment entered in the office of the clerk of said court, and the said judgment was on the same day duly docketed in the office of the clerk of the city and county of New York.

3. That on the day of an execution upon said judgment was duly issued and delivered to the sheriff of the city and county of New York.

4. That at the time of issuing of said execution the said defendants R. & R. were residents of the said city and county of New York.

5. That the said sheriff afterwards, and on the 18th day of January, 1883, and prior to the commencement of this action, duly returned the said execution wholly unsatisfied, and said judgment is still unpaid and unsatisfied.

6. That said judgment was recovered on a promissory note made by said firm of R. & R. and given to plaintiff, for and on account of coal sold by plaintiff to said firm.

7. That the said defendant R. & R. prior to the 23d day of October, and after the indebtedness upon which said judgment was obtained had accrued were engaged in the coal business at 612 East 19th street in the city of New York.

8. That on or about the 23d day of October, 1882, the said defendant L. R. and M. R. as said copartners

made a pretended general assignment to the defendant Abraham Rosenthal, of all their property, real and personal, in trust for the benefit of their creditors.

That a copy of said general assignment is hereto annexed marked "Exhibit A," and is prayed to be taken as part of this complaint.

9. That plaintiff alleges that the said pretended general assignment is fraudulent and void *upon its face*; and he alleges upon information and belief, that it was made and executed by the said defendants, L. R. and M. R., and accepted by said defendant A. R. with the intent to hinder, delay and defraud the creditors of the said L. R. and M. R., and the creditors of the said firm of R. & R.

10. That the said assignee A. R. accepted the said trust and has collected a large sum of money from the assets of the said assignors and still has the same in his possession.

11. That all of the property of the said L. R. and M. R. individual and copartnership is embraced in said pretended general assignment, as plaintiff is informed and believes, and plaintiff will be unable to collect his said judgment, unless the property upon which said pretended general assignment is claimed to operate can be applied for that purpose.

12. Plaintiff further alleges, upon information and belief, that at the time of executing the said pretended general assignment, the said L. R. and M. R. were insolvent, both as individuals, and as said copartners.

13. That the respective individual debts of said copartners, were unequal in amount, and they assigned individual property of different amounts and values.

14. That the interests of said copartners, as afore-

said, respectively, in the assets of the said firm, after the payment of said firm's debts, were unequal in amount.

Wherefore the plaintiff demands judgment:

1. That the said pretended general assignment be adjudged fraudulent and void as against the plaintiff.

2. That a receiver of all the property and effects of said L. R. and M. R. and the said firm of R. & R. be appointed.

3. That the defendants be adjudged to account for all the property received by them or either of them, under said pretended general assignment, and for all proceeds arising from the sale thereof, and deliver the same to such receiver.

4. That the defendants be, in the meantime, enjoined from disposing of any of said property, or paying away any of the proceeds thereof, or in any wise interfering therewith.

5. That the said receiver pay out of proceeds of said property the judgment aforesaid, and the costs and expense of this action, and hold the balance subject to the further order of this court.

6. And that plaintiff have such other or further relief in the premises as may be just.

-----, Attorney for plaintiff.

(Verification.)

[See Cases in the Court of Appeals, Vol. 825.]

NOTE.—The assignment, in the case from which the foregoing form was taken, after providing for the firm debts, out of the proceeds of the assigned property, then provided "that with the remainder and residue of said net proceeds and avails, if any there shall be, the party

of the second part shall pay and discharge all the individual and private debts of the parties of the first part, or either of them, whether due or to become due, providing such remainder shall be sufficient for that purpose; and if insufficient, then the same shall be applied *pro rata*, share and share alike, to the payment of said debts, and according to their respective amounts."

It was claimed by plaintiff that the above quoted provision, that the surplus, after payment of the firm debts, be "applied *pro rata*, share and share alike" to payment of the individual debts, operated as a fraud in law upon the individual creditors of the partner, having the largest individual estate and the smallest indebtedness, and this view was taken by the General Term. The Court of Appeals, taking a different view, held that the said language of the assignment did not "contain authority to the assignee, from each member of the firm, to satisfy the individual debts of the other, from the combined individual property"; and that, though the assignment did not expressly recognize the two individual funds, which might exist after payment of the firm debts, yet the law would supply this omission, assuming it to be one, and would order a distribution of such surplus funds according to the legal rights of the claimants upon it.

Crook v. Rindskopf, 105 N. Y., 476, 486.

But while an assignment is not to be adjudged fraudulent upon technicalities of form, or upon a doubtful construction of its language, yet the courts are ready to set the entire assignment aside for *fraud*, though such fraud affect but a small portion of the assigned property,

and be confined to a single instance in the disposition of it.

First Nat. Bank of Westport v. Raymond, N.
Y. Daily Reg., Oct. 8, 1888.

In the recent case in the Supreme Court, just cited, Judge O'Brien thus expressed the settled principle of law, applicable to assignments which are fraudulent in part: "Except as to the transactions with his wife, the assignor has explained and disproved all the other fraudulent acts alleged against him, *but a single instance showing a disposition of property with intent to defraud creditors, will destroy an assignment, however valid all other acts in connection with it may be.*

See also page 37, *ante*.

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